

**Federal Courts  
Study Committee**

**Working Papers and  
Subcommittee Reports  
July 1, 1990**

**Volume II**



Federal Courts Study Committee

Working Papers and Subcommittee Reports

June 1, 1990

The Report of the Federal Courts Study Committee was published on April 2, 1990 in one volume consisting of two parts. Part I contained an overview of the recommendations and Part II described the proposals in greater detail.

The following working papers and subcommittee<sup>1</sup> reports constitute Part III of the report. These materials were valued background materials which the Committee determined should be published for general consideration whether or not the Committee agreed with their substantive proposals. The Committee considered these materials as well as oral comments at 13 public hearings and many items of correspondence. Committee members also brought their own expertise to the debates on each and every issue.

In no event should the enclosed materials be construed as having been adopted by the Committee.

Federal Courts Study Committee  
22716 United States Courthouse  
Independence Mall West  
Philadelphia, Pennsylvania 19106

(215) 597-3320

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1. To review the many issues before it, the Committee divided itself into three working subcommittees broadly described as: (1) role and relationships; (2) workload; and (3) administration, management, and structure.

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FEDERAL COURTS STUDY COMMITTEE

Part III

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The working papers herein are not a part of the recommendations of the Federal Courts Study Committee. They may, in some cases, be contrary to the final determinations of the Committee. They are reproduced solely as background material.

**Members of the Subcommittee on  
Administration, Management, and Structure**

*Chief Judge Levin H. Campbell, Chairman*  
*J. Vincent Aprile, II, Esquire*  
*Morris Harrell, Esquire*  
*Senator Howell Heflin*  
*Judge Judith Keep*  
*Denis J. Hauptly, Reporter*  
*Professor Thomas E. Baker, Associate Reporter*  
*Michael C. Gizzi, Assistant Reporter*

**Advisors to the Subcommittee**

*Professor Daniel J. Meador, The University of  
Virginia Law School*

*Professor Maurice Rosenberg, Columbia University  
School of Law*

*Chief Judge Charles Clark, United States Court of  
Appeals for the Fifth Circuit*

*Judge Robert Peckham, United States Court of  
Appeals for the Ninth Circuit*

APPENDIX OF MATERIALS USED IN THE  
STUDY OF THE  
SUBCOMMITTEE ON ADMINISTRATION, MANAGEMENT, AND STRUCTURE

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I.

Report of the  
Subcommittee

The documents included in this Appendix served as part of the background for the Subcommittee's deliberations. Other materials used included published and unpublished papers (including Law Review articles and books) which are not contained herein. Because papers in this Appendix do not come close to covering all the matters the Subcommittee considered, they do not fully reveal the scope of the Subcommittee's discussions during its 6 formal meetings and innumerable informal conversations among some or all of the members. These papers, moreover, including the Subcommittee's report reproduced herein, should not be taken to be settled views of the Subcommittee, much less those of the reporters, advisors, and contributors. Voting procedures were extremely informal, and subcommittee members sometimes withheld their disapproval in order to advance issues for full committee consideration. The members of the Subcommittee continued to discuss the various recommendations and issues with the membership of the full Committee, sometimes changing their earlier views.

## **REPORT OF THE SUBCOMMITTEE ON STRUCTURE TO THE FEDERAL COURTS STUDY COMMITTEE**

**Chief Judge Levin H. Campbell, Chairman  
J. Vincent Aprile, II Esq.  
Morris Harrell, Esq.  
Senator Howell Heflin  
Judge Judith Keep  
Denis J. Hauptly, Reporter  
Professor Thomas Baker, Associate Reporter  
Michael C. Gizzi, Assistant Reporter**

### **ACKNOWLEDGEMENTS**

**The Subcommittee wishes to acknowledge the efforts and the contributions of a number of people who made its work possible but who should bear no blame for any errors or omissions in the Subcommittee's work.**

**The Subcommittee's advisors included Professor Daniel Meador of the University of Virginia School of Law, Professor Maurice Rosenberg of Columbia University School of Law, Chief Judge Charles Clark and Judge Robert Peckham. They gave tirelessly of their time and generously with their thoughts. They served as sounding boards, as devil's advocates, and as detached observers.**

**A whole host of people drafted background papers for the Subcommittee or contributed work already prepared. These include:**

**Lee Beck, Joseph Belton, Judge Steven Breyer, Professor Stephen Burbank, William Burchill, Professor Paul Carrington, Judge Frank Coffin, David Cook, Robert Feidler, Steven Flanders, Sam Gerdarno, Judge John Godbold, Chief Judge Ted Goodwin, Professor Arthur Hellman, John T. Jones, Raymond A. Karam, Robert Katzman, Judge Robert Keeton, Duane R. Lee, Theodore Lidz, Peter McCabe, Judge Howard Markey, Ralph Mecham, Michael Mooney, Stanley Morris, National Center for States Courts, Paul Nejelski, Judge Arthur Nims, John Rabiej, Michael Remington, Judge Paul Roney, David Sellers, Karen Siegel, Chief Judge Loren A. Smith, Steven Suddaby, Judge Robert Vance, Owen Walker, Judge Clifford Wallace, Scott Williams, Joseph Wolfe, and Judge William Young**

**These uncompensated efforts are greatly appreciated and we hope that this report does not to them prove the truth of the old saw that no good deed goes unpunished.**

The Circuit Executive of the First Circuit, Vincent Flanagan, and Patricia Dundas, the Assistant Circuit Executive, provided insightful and invaluable help in compiling and structuring statistics and graphs. The Staff Attorney's Office in the First Circuit contributed papers from Kathy Lanza and Jeffrey Barr, both of which stand as continuing proof of the quality of that office.

## INTRODUCTION

This report summarizes the findings and conclusions of the Subcommittee. It is divided into two major parts: Administrative Matters and Appellate Court Structure.

The label "Administrative Matters" is convenient but not entirely descriptive. It refers to a number of discrete issues which are essentially independent matters and which, to varying degrees, are matters under the scrutiny of some existing arm of the Judicial Conference of the United States or the Administrative Office of the United States Courts. Our conclusions in these areas, not surprisingly, often involve suggestions for further study or specific consideration by the appropriate existing body. Much of our work in these areas, then, is more in the nature of an audit; the report of a group that has reviewed the area, has noted what seem to be problem areas and refers and defers to those with greater expertise.

The Appellate Court Structure issue is quite a different matter. There is no group in the judiciary charged with oversight over the major adjudicatory aspects of the structure. No agency exists whose concerns are systemic; whose mandate is to ask and to try to answer the basic questions about how the Federal judiciary operates. This basic need has been filled haphazardly by the writings of academics and judges. Indeed, one of our major recommendations is that a long-range planning unit be established to fill this need in a systematic way.

In both the administrative area and the appellate court area, the dominant influence has been volume. Caseloads in all areas have risen dramatically over the past twenty-five years. It is difficult to predict what the next twenty-five years will bring, but the safest guesses are those which foretell a continuation of past trends. The Committee seems likely to make several proposals which will limit federal jurisdiction or channel it in some way to relieve the pressure on the Article III courts. Some such measures are needed because there are some areas in which the existence of an Article III forum cannot be justified.

There is no certainty, though, that such measures will be adopted. In addition, there is a statistical certainty, at least, that even major changes in federal jurisdiction will be eaten up in a very short time by increases in the caseloads in the areas that remain.

Moreover, there is a finite limitation on the amount of jurisdiction reduction that can be done. Some cases properly belong in federal courts and their removal cannot be justified on the basis of systemic overload. When the demand for electricity increases to the point of "brownouts," the appropriate initial response is to urge moderation and to eliminate wasteful uses. In the end, though, one may have to build more generating plants and heavier power lines. With courts, too, conservation and careful excision are required. But in the end, it is clear that more judges will be needed and that the structures that support those judges will have to



be altered to handle the new load. At least this is true, in the appellate area, unless our concept that every litigant has a right to appeal is replaced by a system of discretionary review, i.e., where the circuit courts, like the Supreme Court today, choose the cases they will hear.

## **I. ADMINISTRATIVE MATTERS**

### **A. MAGISTRATES.**

The Federal Magistrates System plays a vital role in the work of the U.S. District Courts. Magistrates are adjuncts to the district court. In general, the jurisdiction of a magistrate is the jurisdiction of the district court, delegated to the magistrate by the district court judges, under statutory authorization. A magistrate's duties include initial proceedings in criminal cases, references of pre-trial matters by judges, and trial of misdemeanors, petty offenses, and civil cases upon the consent of the parties and reference of the judge. We recognize the value this system plays in the administration of the U.S. District Courts.

Magistrate positions are authorized by the Judicial Conference. Individual magistrates are appointed by the district court for a term of eight years. To be a magistrate one must have been a practicing lawyer for at least five years and have been nominated by a Merit Selection Panel. The merit selection process coupled with recent advances in compensation and retirement programs ensures the district courts of highly-qualified magistrates. Indeed, in recent years it has not been unusual for state court judges to apply for positions as United States Magistrates.

This is a system that has matured and is now playing a vital role in the operations of the federal courts. While different courts use magistrates in different ways, in each federal district the magistrates provide a capacity which keeps the system afloat.

The Federal Courts Study Committee received a great deal of information about the role that magistrates should perform, as well as suggestions for changes in their title and role. That material came from the following sources: (1) testimony at the public hearings; (2) letters from magistrates and district judges; (3) a report from the National Council of United States Magistrates (the NCUSM is an independent, voluntary organization of full-time, part-time and retired U.S. Magistrates); and, (4) a report entitled The Federal Magistrates System prepared by the Administrative Office of the United States Courts, Division of Magistrates.

A broad overview of this material follows. Some magistrates believe that they are under utilized and desire more diversity in the work they are assigned by the district court; apparently a few courts assign to the magistrates little more than Social Security cases and prisoner cases for review. Some magistrates propose statutory changes that would, in effect, make them judges. They wish, for example, to be given authority to handle dispositive motions in civil cases and to routinely be assigned civil cases as part of the draw, with a 30-day period for the parties to opt for a district judge instead of a magistrate. There also were numerous fine-tuning proposals submitted. For example, it was suggested that a statutory change which would allow consent in petty offense cases to be made orally before the magistrate in open court rather than in writing.

As a Subcommittee, we favor encouraging procedures which will maximize utilization of magistrates. However, as was stated in the Administrative Office's report, we must "safeguard against undermining the institutional 'supplementary' role of magistrates" and the "unintentional creation of a lower-tiered judicial office with separate and distinct responsibilities." The Federal Magistrates System, p. 16. The reasons for this are perhaps obvious; a few will be stressed herein. First, the needs of each district court are different, but clearly the district courts need the assistance of the magistrates in order for the judges to handle matters which require Article III attention. If in fact the magistrates become a second-tier judicial office, the magistrates would not be able to assist the judges of the district court. Not only do the needs vary between courts, but the needs can vary within a court depending on the caseload that an individual district judge faces. A judge with a small criminal caseload may prefer to handle civil discovery matters in order to get a handle on the case. Should the judge's criminal caseload suddenly increase because of the sentencing guidelines and mandatory minimum sentences, then the judge may need to refer civil discovery matters to the magistrate.

Hence, in regards to magistrates, we recommend the following:

**1. Amend 28 U.S.C. 636(c) to Permit District Judges and Magistrates to Encourage Consent to Civil Trials Before the Magistrate.**

On the district court level, the task today and for the next 25 years will be to maximize the efficient utilization of Article III judges, the magistrates, and community resources in order to resolve civil disputes. In that regard, in civil cases, we must be creative in using available resources to resolve disputes. Court annexed arbitration, lawyer mediation, mini-trials, appointment of special masters, use of magistrates to assist in civil cases and to conduct settlement conferences, and consent trials before magistrates are all vehicles that the courts will have to use to keep current with the civil caseload.

In light of the above, 28 U.S.C. 636(c)(2) is too restrictive. It provides:

if a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of the court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. Thereafter, neither the magistrate nor the district judge shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate.

(Emphasis added)

Our recommendation is that the italicized language be deleted and replaced with the following:

**"Thereafter either the district court or the magistrate may again advise the parties of that right but, in doing so, shall also advise the parties that they are free to withhold consent without fear of adverse substantive consequences."**

Courts are going to have to encourage litigants to pursue alternative dispute resolution. It is illogical that a court could encourage alternative dispute resolution but not encourage consent to trial before the magistrate. The practicing attorneys on our Subcommittee were concerned that some judges might coerce trial before the magistrate; of course, these same



judges might coerce alternative dispute resolution also. It might alleviate concern of the bar if, in its legislative history, Congress indicated that while magistrates and judges are authorized to encourage consent to trials before the magistrate, both magistrates and judges should be sensitive to the rights of the parties to have their disputes resolved by Article III judges.

**2. The Judicial Conference of the United States Should Commission an Independent In-Depth Study of the Role and Statutory and Constitutional Jurisdiction of Magistrates.** The study should be conducted with the cooperation and assistance of a broad range of persons interested in the operation of the magistrates system.

One problem which district courts have in maximizing utilization of magistrates and that causes hesitancy in expanding the role of magistrates is that there is confusion about magistrates' constitutional and statutory authority. Two recent decisions of the United States Supreme Court, *Northern Pipeline Construction Co. v. Marathon Pipeline*, 458 U.S. 50 (1982) and *Granfinanciera v. Nordberg*, 109 S.Ct. 2782 (1989), have raised serious questions about which matters must be handled by Article III judges. Although both of these cases deal with bankruptcy issues, the Article III discussions are equally applicable to the magistrates. Hence, we propose an in-depth study of the constitutional parameters of utilization of magistrates and circulate the same to all district judges. The study should also analyze the future role of magistrates and propose principles for defining the proper limits of that role.

Further, the recent Supreme Court decision of *Gomez v. United States*, 109 S. Ct. 2237 (1989), raises questions about the statutory duties which a magistrate may properly perform. In *Gomez*, the Supreme Court held that the "additional duties" provision of 28 U.S.C. 636(b)(3) did not permit a magistrate to preside over the selection of a jury in a felony trial without the defendant's consent. In part, the Court looked to the legislative history of the Federal Magistrates Act to determine what type of duties a magistrate could perform. District judges would benefit from an analysis of the legislative history of the Federal Magistrates Act with a list of those duties which bear "some relation to the specified duties" as *Gomez* dictates. *Id.*, at 2441.

Other than 28 U.S.C. 636, there are a few other statutes and cases that refer to the duties that a magistrate can perform. The Administrative Office should also include these cases and statutes so that the district court will have a full inventory of the statutory authority of the magistrate.

Further, we suggest that a description of the standard of review by the district court be included. *De novo* review can be so time-consuming for the court and costly to the litigants that in many cases referral of a matter requiring *de novo* review is inefficient. On the other hand, if the standard of review of a magistrate's ruling is that it is clearly erroneous or an abuse of discretion, then reference of a matter to a magistrate would be more efficient.

**3. Items As to Which the Subcommittee Makes No Recommendation**

**a. Change the title of the magistrate to a title which contains the word "judge."**

Many magistrates as well as the National Council of United States Magistrates propose that their title be changed to include the word "judge." They make a convincing argument that since other non-Article III officers are called judges (administrative law judges, bankruptcy

judges, Claims Court judges) they also should be called judge. The change would reflect a sense of the significant role that magistrates play in the trial system and would pave the way for greater utilization of magistrates within the existing statutory framework.

The problem, frankly, is nomenclature. There is a great deal of disagreement about the name which they should have, e.g., associate judge of the district court, assistant judge of the district court, judge of the magistrates division of the district court.

It had been our impression that the matter would be resolved at the meeting of the Judicial Conference in September of 1989. That did not take place, apparently because there was an expectation that this Committee would be making a specific recommendation. Rather than continue a process of cross-deferrals, we propose that, if the Judicial Conference recommends a change in title, that the title chosen be Magistrate Judge.

That title implies no independent role but recognizes that when a judicial officer acts with full authority, as in consent cases, he or she acts as a judge and merits the respect of that office.

**b. Amend 28 U.S.C. 636 to allow magistrates to accept guilty pleas in felony cases.**

At first glance, such an amendment would save time for the district judge. However, members of the Subcommittee have voiced concerns about the constitutionality and practical effect of such a proposal. For example, the factual basis which the court accepts as the basis for a plea can have serious ramifications on guideline sentencing. The time-saving involved in having a magistrate accept the plea could end up in adding time to the sentencing hearings because a defendant could contest facts that would aggravate his or her sentence. A magistrate, unfamiliar with the guidelines and facts of the case, often would not require admission of those facts during a change of plea. Further, we believe that if the magistrates accepted guilty pleas there would probably be more motions to withdraw the plea for constitutional defects before the district judge.

**c. Authorize "original jurisdiction" in certain non-Article III claims.**

The problem with this proposal is that it will create a two-tier judicial system on the district court level, and once magistrates assume their caseload, they will cease to function in the support role which we feel is imperative for them to perform. In its 1981 Report to the Congress, the Judicial Conference emphatically rejected this proposal.

**d. Amend the requirement of written consent to trial by magistrate to allow for oral consent.**

Apparently, the Judicial Conference did recommend this in its 1981 report to Congress. As a Subcommittee, we had no objection to this proposal. However, any time-saving would be negligible and frankly the issue seemed too specific for the broad mandate of our committee.

**e. Provide the magistrates with contempt power.**

Again, this is a fine-tuning issue better left to some other committee. Also, the issue of contempt is fraught with constitutional hurdles, as has been demonstrated by the recent history

of cases involving the bankruptcy judges.

f. Magistrates retirement benefits should include the "Rule of 80" and part-time magistrates should have a retirement system which would parallel that of full-time magistrates.

The financial effect and wisdom of this proposal frankly was beyond our committee's time constraints. Recent changes in the magistrates and bankruptcy judges retirement system have create one anomaly which ought to be considered. Simplifying the matter somewhat, magistrates and bankruptcy judges may now retire on full salary at age 65 with 14 years of service. A magistrate who is under consideration for a district court judgeship at age 55, faces the choice of staying as a magistrate for ten more years and retiring at 92% of a district judge's salary or accepting the district judgeship and being ineligible for retirement until age 70.

This situation places a substantial obstacle in the way of recruiting bankruptcy judges and magistrates with long experience for positions on the district court. We believe that this is unfortunate and should be resolved, perhaps by crediting years as a magistrate or bankruptcy judge towards the years of service required for retirement as an Article III judge.

g. The Board of the Federal Judicial Center should include representation of magistrates and magistrates and bankruptcy judges should have non-voting membership on circuit councils.

Magistrates should participate in the business of the courts, including full membership in circuit judicial conferences and observer status at circuit council meetings. Philosophically, as a Subcommittee, we endorse the notion that there should be parity between magistrates and bankruptcy judges insofar as membership on the Board of the Federal Judicial Center and membership in judicial conferences and observer status at circuit council meetings is concerned. Again, these are fine-tuning issues which are better left to the Judicial Conference of the United States and the various Judicial Councils.

h. Magistrates should be granted jurisdiction to authorize wiretaps under Title III of the Omnibus Crime Control Act, 18 U.S.C. 2510 et seq.

The National Council of Magistrates has made this proposal. We as a Subcommittee do not endorse it. The issue of wiretaps is particularly sensitive and supervision by an Article III judge is, therefore, important.

i. Eliminate the requirement of consent in petty offense cases.

The National Council of Magistrates also made this proposal. There are philosophical problems with eliminating consent altogether. In effect, this would be the first step in creating a two-tier trial court system. As indicated above, the structure Subcommittee felt that the issue of whether consent should be oral or written is better left to another committee.

j. Magistrates should have the authority to conduct all or part of felony proceedings, with the consent of the parties upon a order of reference from the district judge.

Again, this proposal came from the National Council of Magistrates. It is fraught with constitutional problems and therefore we as a Subcommittee do not endorse it.

k. Magistrates should be granted authority to issue temporary restraining orders and preliminary injunctions without the consent of the parties, and to enter final orders in all motions (dispositive and non-dispositive) subject to appeal.

Again, this proposal came from the National Council of Magistrates. We see constitutional problems with this proposal and we anticipate extremely strong opposition from the bar.

## **B. FEDERAL DEFENDER ISSUES**

More than twenty years have passed since the last independent review of the Criminal Justice Act was undertaken. The program has grown substantially in size and complexity. Panel attorney appointments have risen from 16,000 in 1966 to 65,000 in 1988. In view of the importance of the program and the issues which have arisen, particularly concerning the judiciary's role in the creation and termination of a federal defender organization, the appointment, reappointment, and compensation of federal public defenders, and the appointment and compensation of panel attorneys, an in-depth study of federal defender issues should be commissioned.

**The Subcommittee recommends that the Judicial Conference should create a special committee to initiate a comprehensive review of the CJA, its implementation and administration.**

The purpose of the review would be to assess the current effectiveness of the CJA and to recommend appropriate legislative policy, procedural and operational changes.

Such a committee should contain representatives of the criminal defense bar selected by the National Legal Aid and Defense Association (NLADA), the National Association of Criminal Defense Lawyers (NACDL), and the Criminal Justice Section of the American Bar Association as well as present and former federal defenders. Because the public fisc and relations with the courts are involved, as well as issues of administration, ethics and the public interest, persons reflective of such perspectives should likewise be included.

**The Subcommittee recommends that such a committee should focus on:**

1. **The impact of judicial involvement on the selection and compensation of the federal public defenders and on the independence of federal defender organizations, with special emphasis on:**
  - a. **Appointment, reappointment, and compensation of federal public defenders;**
  - b. **Establishment and disestablishment of federal defender organizations;**
  - c. **The federal public defender and the community defender option.**



2. **Equal employment and affirmative action inadequacies, particularly as to the directors of the various federal defender programs.**
3. **Judicial involvement in the appointment and compensation of panel attorneys and experts.**
4. **Inadequacy of compensation for legal services provided under the Criminal Justice Act (CJA).**
5. **The quality of CJA representation.**
6. **Lack of adequate administrative support for defender services programs.**
7. **Maximum amount of compensation for attorneys in regards to appeals of habeas corpus proceedings.**
8. **Contempt, sanctions and malpractice representation of panel attorneys.**
9. **Appointment of counsel in multi-defendant cases.**
10. **Early appointment of counsel in general and prior to the pretrial services interview in particular.**
11. **The method and source of payment of the fees and expenses of fact witnesses for defendants with limited funds.**
12. **The provision of services and/or funds to financially eligible arrested but unconvicted persons for non-custodial transportation and subsistence expenses, including food and lodging, both prior and during judicial proceedings.**

With respect to compensation under the Criminal Justice Act, the Subcommittee believes that a specific formula is beyond its expertise. However, the notion that Criminal Justice Act representation is or can be a casual pro bono assignment has long since been outmoded. While we do not anticipate that Criminal Justice Act representation will be compensated at the rates charged by leading retained counsel we do believe that representation of indigent defendants should not involve a financial loss to counsel.

The Subcommittee recommends that the special committee propose a formula for compensation of Criminal Justice Act counsel which includes an amount to cover reasonable overhead and a reasonable hourly wage.

#### Separate Views of Mr. Aprile

The Federal Courts Study Committee should recommend that legislation be enacted to insure that the selection of the federal defender in each jurisdiction should be done by an independent board or commission formed within the district to be served.

Currently at least six federal defenders are selected by independent boards. These community defenders are in San Diego, Chicago, New York, Philadelphia, and Atlanta. These programs, in the opinion of most, are consistently among the best federal defender offices. In these jurisdictions the federal judges are virtually removed from the time consuming burdens of both selecting the chief defender and administering the panel attorney system.

"The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyers and clients." ABA Criminal Justice Standards (2nd Ed 1982), Providing Defense Services, Standard 5-1.3. "The plan and the lawyers serving under it ...should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice." *Id.* "An effective means of securing professional independence for defenders is to place responsibility for the governance of the organization in a board of trustees. Assigned-counsel components of the legal representation system should be governed by such a board." *Id.*

Given the maturation of the defender movement, the dramatic increase in criminal prosecutions, the evolving sophistication and complexity of criminal law, the constitutionally mandated necessity of competent defense counsel, the small percentage of the legal profession that practices criminal law, the legal and ethical requirement of an independent criminal defense bar, the heavy workload of the federal judiciary, the independence of the federal prosecutor, and the rebirth of the federal death penalty, it is now essential to insure the continued development of independence and autonomy within federal defender programs by assuring that the selection of federal public defenders as well as their retention and termination will be the responsibility of an independent commission or board.

### **C. MANAGEMENT STRUCTURE OF DISTRICT COURTS**

Respecting the management structure of district courts we recommend that the Federal Courts Study Committee ask that the Federal Judicial Center, or other entity selected by the Federal Judicial Conference, conduct a study to include:

1. **Training and job descriptions for both chief judges and for judges next-in-line to become chief judges;**
2. **Continuation and possible expansion or contraction of district court executive program, including consideration of chain of command between district executive and clerk;**
3. **Relationship between district court clerk/executive and bankruptcy court, probation office and pretrial service office;**
4. **Authority to assign judges at specific stations within district, and to obtain outside help.**

The Subcommittee has examined the method of selection of chief judges and has concluded that the current seniority systems while not faultless, operates well in practice. Seniority of course, does not ensure management ability, but prospective chief judges can, and sometimes, should decline the position or can delegate some responsibility to other judges.

The Subcommittee concurs in the belief of the Executive Committee of the Judicial Conference that there is a need to do everything possible to ensure that chief judges and administrators of all the courts are well-trained and fully competent. As courts become busier and busier, and as programs such as budget decentralization attract increasing interest, it becomes critical to have able administration. Chief judges need not, and probably should not, seek to be micro-managers. Enlisting the aid of good professional staff and encouraging their colleagues to share in the running of the court, is a most important skill. Still, their leadership can spell the difference between a successful and an unsuccessful court operation. There should be a well-designed program to train chief judges for their responsibilities. The work of the study committee would provide a useful starting point for the development of such a program. It would be useful, also to, have preparatory training for those judges soon to become chief judge.

The problems of the administration in an era of burgeoning caseload are such that fully professional assistance is required. Creation of the office of circuit executive two decades ago reflected the growing awareness of the need for professional court administration. The ultimate test of professionalism is, of course, performance -- which turns as much or more on dedication, experience and talent as on special training. Still, the dedicated professional court administrator, skilled in modern management and familiar with the uses of automation, is the key to the efficacy of our courts. No court, in this era, can afford to hire key administrative personnel without a careful search and evaluation process designed to promote, or obtain from the outside, the most qualified person. All courts -- as many are now doing -- should advertise and open up key administrative positions on a fully competitive basis.

A District Executive pilot program, patterned somewhat on the position of a circuit executive, has been instituted in eight metropolitan district courts. This program has had mixed reviews. In the nation's largest district court, the Southern District of New York, the office has reportedly worked well. In some other locations there has been friction between the role of the traditional chief administrator -- the clerk of court -- and this new, largely undefined function. Even more than the role of circuit executive, which provides responsibility for a number of courts, this position has a built-in potential for a power struggle.

Superimposing a new and undefined function over, or side by side with, existing functions seems bound to create some difficulties. It may be that only certain very large courts can support the two separate offices, although we do not mean to denigrate the arrangement where it is working well. Much of this problem can be averted by upgrading existing functions instead. Clerks should be hired, as is increasingly the case, on the basis of management merit and ability to handle a broad range of court management functions. In larger courts the supervision of the clerk's office can be one of several functions that the clerk "administrator" oversees. To accomplish this end we believe that a title change is desirable to reflect a range of responsibility.

**We recommend that in the district courts the title of Clerk of Court be changed, as an individual court's option, to that of District Court Administrator.**

**The title of clerk, whatever else it denotes, does not adequately convey the multi-faceted management role that is increasingly expected of today's clerks. By emphasizing the administrative role of clerks, we believe that administrative functions will be enhanced and friction between competing offices will be avoided. We have left the change optional since in some districts the older title may still be preferred. Also, in those districts that retain District Executives, the proposed title may not be appropriate.**

**In making these recommendations, we wish to emphasize the superlative job that courts have done in administering a caseload that has grown beyond all expectations. The ability of the federal courts to keep on top of constant growth has been due in small measure to modernization measures which, with Congressional support, the courts have developed. Such steps as the creation of circuit executives have been crucial. Further professionalization and modernization must continue.**

#### **D. JUDICIAL CONFERENCE OF THE UNITED STATES**

**Regarding the Federal Judicial Conference, we note that in 1987, after Justice Rehnquist became the Chief Justice of the United States, he appointed a committee of judges to join him in a study of the organization of that body. The committee obtained responses and suggestions from judges throughout the federal system. It issued a report that the Conference implemented in toto. As a result, new conference committees were created; older ones were disbanded; many new judges were appointed by the Chief Justice to conference committees; and rules were established which, among other things, tended to open up and expedite the Conference. A major change was the establishment of a strengthened Executive Committee which, for the first time, has a chairman other than the Chief Justice himself. While the latter may, whenever he desires, still exercise the chair's powers, it is the designated chairman, a senior conference member appointed by the Chief Justice, who calls meetings and leads the Executive Committee in its normal functions. In addition, the chairman presides over the Conference when the Chief Justice cannot be present. This enables the Executive Committee and its chairman to exercise leadership on behalf of the Judicial Conference in the interim between the latter's semi-annual meetings. Especially on budgetary and legislative issues, the Executive Committee has been able to authoritatively instruct the Administrative Office and advise Congress as to the judiciary's policies. While the Chief Justice is kept fully informed, he need not attempt the impossible task of keeping abreast of all these matters. The first chairman of the newly-constituted Executive Committee was Judge Wilfred Feinberg, Chief of the Second Circuit; the present chairman is Judge Charles Clark, Chief of the Fifth Circuit.**

**Generally speaking, our Subcommittee sees no need to urge further change in the Conference structure, especially since the matter was studied so recently.**

**However, the Subcommittee believes that the Federal Courts Study Committee should encourage the Chief Justice's plan to appoint a committee in 1990 or 1991 to review the structure established in 1987 including the issue of "chancellor" (see discussion, below).**



**We also recommend that the ability of the Judicial Conference to issue rules and regulations for the federal judiciary, a function that it has been carrying out in practice for many years, be recognized by statute.**

**At present the Conference is authorized to oversee the Administrative Office but has no grant of general power; only the separate circuit councils have statutory administrative powers. Yet the Conference must frequently adopt directives which effectively regulate matters of administration within the federal court system. Because of its statutory oversight of the Administrative Office, and the latter's statutory powers, these directives are likely to have adequately implied legal foundation; but some could be questioned. We think the Judicial Conference's rule making function in the court administration areas should be given a more explicit statutory basis. We suggest that a statute to accomplish this be drafted and be presented with the Committee's report.**

**In regard to the appointment of the Director of the Administrative Office of the U.S. Courts, the suggestion was made at a meeting of the Subcommittee that the power of appointment be transferred from the Supreme Court to the Judicial Conference of the United States. Currently the Supreme Court appoints the Director of the Administrative Office, yet the court, with the exception of the Chief Justice, is removed from issues of administration of the federal judiciary. The Administrative Office serves the lower courts and is not responsible for the administration of the Supreme Court (which has its own administrative structure). Hence, it may well be appropriate for the Administrative Office's director to be appointed by the Judicial Conference which is also headed by the Chief Justice. We understand that the Chief Justice accepts this position.**

**In regard to the issue of creating a "Chancellor of the U.S. Courts," the American Bar Association has recommended the creation of a position occupied by a federal judge appointed by the Chief Justice, who would function as the administrative head of the judiciary. Sometimes termed for brevity, a "chancellor", this official would exercise on a full-time basis, many of the powers now exercised by the Chief Justice (and often recently delegated by him to the Chairman of the Executive Committee and the Director of the Administrative Office). The Subcommittee has conferred with the Chief Justice and concurs with his suggestion that this issue be the subject of a report by a committee that he will appoint in 1990 or 1991 to review the operations of the Judicial Conference structure as modified in 1987. The Chief Justice feels that it would be premature to make recommendations for specific changes at this time. While agreeing that this course of action is appropriate, some members discussing the matter believed that a viable alternative to the creation of a Chancellor would be the statutory authorization of the new executive committee structure. The chair of the Executive Committee could fulfill most of the duties of the Chancellor without formally changing the responsibilities of Chief Justice. On the other hand, the pressures for planning, testifying before Congress, and leadership generally, may have reached a point where full-time service by a judge, rather than the part-time service of the Executive Committee Chair, is required. This is a matter that will require very careful and extended consideration by knowledgeable persons under the aegis of the Chief Justice.**

## **E. JUDICIAL COUNCILS AND FEDERAL COURT EXECUTIVES**

**The Subcommittee recommends that the Federal Courts Study Committee encourage long range local planning by circuit counsels on administrative matters, in light of present trends toward decentralization of budgeting, space and facilities planning, and the like.**

**The Subcommittee feels that the circuit judicial councils are a very worthwhile and necessary component of the judiciary. Yet we are concerned about the variations in representation by district judges and the lack of representation on the councils by magistrates and bankruptcy judges. We recommend that the Federal Courts Study Committee encourage the Judicial Conference to determine whether the composition of judicial councils should be prescribed by statute in a nationally uniform manner, and to work for any necessary statutory changes.**

## **F. ADMINISTRATIVE OFFICE OF THE U.S. COURTS**

**In respect to other aspects of administration within the federal courts, the Subcommittee recommends the following:**

- 1. Approve the Administrative Office's pilot studies of decentralized budgeting, procurement, and other administrative matters.**

**This involves giving circuits and districts greater authority to determine how to allocate available funds. As it is now, each court receives a budget by category: personnel, furniture, equipment and so forth. Courts are not free to transfer among categories as needed. Greater flexibility is appropriate both to meet changing or unique circumstances and to give each court some say in establishing its own priorities.**

- 2. Encourage greater understanding and flexibility by the Administrative Office and its personnel in respect to local court operations and viewpoints.**

**There is tension between certain Administrative Office divisions, perceived by some to be overly bureaucratic, and judges and court administrators in the field. As, however, there is a committee of the Judicial Conference that is charged with oversight of the Administrative Office and as the Judicial Conference itself has ample statutory authority to correct perceived problems, it seems unlikely that the Federal Courts Study Committee should become greatly involved in these matters. Subcommittee members praised the current administration of the Administrative Office, including its director, and noted many positive changes in recent years. The chairman of the Subcommittee has conferred with the Chairman of the Administrative Office Oversight committee. The latter believes the Administrative Office is currently doing well.**

- 3. Encourage the development of the concept of regional offices for the Administrative Office.**

Along with budget decentralization, the concept of regionalization of some administrative and training functions now being performed in Washington, D.C., has become a topic of considerable discussion among managers and judges in the federal courts. The expectation is that regionalization will foster an identification with the needs of the individual courts and will allow both court personnel and the Administrative Office personnel to gain a greater understanding of each other's roles. We believe that such a proposal is useful. While excessive decentralization is not to be desired, the current situation may lend itself to creating too much of an artificial barrier between these two parts of the judiciary. On the other hand, we believe that the emphasis in regionalization should be on providing more effective support and not on tighter control of field operations.

#### **G. COURT REPORTERS**

We recommend that the final report of the Federal Courts Study Committee recognize the enormous importance of an excellent court reporting system to the Judiciary. To achieve that goal, the courts should take full advantage of the rapidly evolving technology. However, some caution is needed. Advances in technology are continuing and wholesale investment in systems that may quickly become obsolete are obviously to be avoided. Moreover, what is an advance at the trial level, may be a barrier at the appellate level. Thus systems need to be evaluated in terms of their impact on the system as a whole.

Delays in obtaining transcripts are probably the most serious single causes of appellate delay. Court reporters today are caught between a rapidly evolving technology and the threat that this creates to their skills. The Federal Courts Study Committee does not have the resources to study and report on the specifics in this area; there are a number of detailed issues of continuing concern to reporters and to the courts. But we urge that the Administrative Office and the federal courts give high priority to seeing that transcripts are produced in the most efficient and expedient manner possible.

Due to the incredible innovations that occur virtually daily in the fields of audio-and-video-recordings as well as in computer development, today's technological marvel may be obsolete tomorrow. As a result, the federal courts should be cautioned, while ever pursuing technological improvements to eliminate unnecessary delay and to reduce the ancillary costs of litigation, to avoid wedding themselves to any particular technology, such as videotaped transcripts, to the extent that such an "innovative" system may be incompatible with other technological breakthroughs which are better able to reduce both delay and expense.

The Federal Courts Study Committee should also caution that the resort to a technological innovation, such as videotaped transcripts, at any level of the federal judiciary should not occur until the impact of that improvement is assessed by both the courts and litigators at any lower and/or higher court levels. Special concern must be given to insure that a technological breakthrough at one level of the judiciary is not implemented for the savings of time and money there, when use of that new technology will generate either comparable delays or costs, albeit redistributed, at another level of the judiciary.



## **H. COURT SECURITY**

The Chairman of the Subcommittee received a letter from Stanley Morris, Director of the Marshals Service, suggesting several issues as appropriate for study the Federal Courts Study Committee. On the basis of the comments from the Director of the Administrative Office, however, it appears that most all of these matters are now under consideration by various judicial conference committees. Of particular interest is a study of under-utilized facilities now underway. We believe that a prudent reduction in facilities would assist in providing adequate security for the remainder. It does not appear that the Federal Courts Study Committee should deal with the matters mentioned by the Director, since all can be adequately handled through existing mechanisms and procedures.

We do recognize the importance of court security. The importance of security is greatly underscored by the increase in drug trials. There is a tension between the access to the courts that we all desire and the need to be certain that the courtroom is a safe environment. We believe that the details of such matters are best left to the professionals involved with the assistance of the Committee on Court Security. We recommend that the Federal Courts Study Committee support efforts to enhance courthouse security.

## **I. SENIOR JUDGES**

Legislation affecting senior judges is presently under consideration by Congressman Kastenmeier's Subcommittee, and may even have been enacted into law by April, when the Federal Courts Study Committee's report is due. The principal concern from the perspective of the judiciary and the public, is to maintain the incentive which the current senior judge system affords for a judge to retire on senior status, thus permitting his or her position to be filled by a new judge while, at the same time, the older judge continues to offer service to the courts as a "senior judge." Any amendments to existing laws which discourage judges from accepting senior status when eligible, could have the effect of depriving the courts of a valuable pool of man and woman power.

We recommend that the Federal Courts Study Committee should (a) endorse the usefulness of the senior judge system; (b) oppose the creation of disincentives that could discourage judges from accepting senior status and cause them either to accept outside employment or hold on to active status during their advanced years.

No other organization in the nation has devised such a successful method of utilizing retired employees in its work force at little more expense to the taxpayer than what their pensions would have cost, while opening up new positions for younger persons. Without senior judges, it would be necessary to create 80 more judgeships at an additional cost of 45 million dollars to provide equivalent service to the public. Far from causing a loss to the taxpayers, the system has been a source of enormous public benefit by persons who, in most other occupations, would be receiving pensions yet performing no public service.

## **J. JUDICIAL DISCIPLINE**

Judicial discipline machinery developed by Congressman Kastenmeier several years ago has resulted in a successful system within the judiciary for investigating complaints against

judges, and for sanctioning judges, within constitutional limits, where warranted. Recent legislation now pending is designed to improve various aspects of these procedures. The subcommittee endorses the present system and such changes for fine-tuning as may be needed.

Congress is increasingly concerned by the burden on its members imposed by the Constitutional requirement that removal of judges for misconduct be carried out solely by impeachment in the Congress. Recent lengthy impeachment proceedings of federal judges have taken much time and effort by busy senators and congressmen. Members are proposing, or will propose, legislation that could lead to amending the Constitution so as to place a removal of lower federal judges in the hands other than Congress.

Any alteration of Article III so as to alter the provision applicable to judicial impeachment would be of tremendous importance and concern, not only to judges but to the nation. Constitutional restrictions upon removal protect judges against outside pressures that might force them to decide cases other than in accordance with the law and their consciences. We would oppose any change in the current method of replacing federal judges that did not afford the same level of protection for judicial independence as now exists. We do not, however, oppose studying the possibility that some other equally effective device may be found.

#### K. LONG RANGE PLANNING

The volatility of change throughout our society has made long range planning a subject of increasing importance in all areas. The Judiciary, as a body, is not well-g geared to looking at down-the-road problems because the judges who comprise it have tremendous day-to-day responsibilities which consume most of their time. Beyond the judiciary, however in academia, public policy institutes, and the like—there are only a handful of people with sufficient detailed knowledge of court problems to make knowledgeable contributions. This is not to say that some excellent planning in reaction to present problems has not been done by Administrative Office of the United States, the Federal Judicial Center, committees of the Judicial Conference, and court administrators in the field. The proposed legislation, elsewhere referred to in our report, to enable the Judiciary to take greater initiative in leasing and building court facilities is such an example. The innovative CAMP court settlement program developed in the Second Circuit is another example. Recently the Director of the Administrative Office has perceptively established a planning office to help guide the operations of the Administrative Office itself. We are not suggesting that the federal courts, with the assistance of Congress, have not kept themselves up to date.

Yet, the rate of change has, if anything accelerated. The unabated increase in case volume suggests serious problems ahead. We think it is not enough for the courts just to offer innovative solutions to growing problems; they must have a better ability to analyze trends and problems; and to recognize and get ready to address future problems.

At present, most operational planning is done in the Administrative Office (where the Director has perceptively established a planning office). Some planning is also done on a project-by-project basis by the Federal Judicial Center. The need for planning is signalled informally from a myriad of sources: Congressional dissatisfaction; complaints or concerns of judges; concerns expressed by the Chairman of the Executive Committee or other conference members or committees, etc. When these needs surface, however, the resources in-house are relatively few. Outside consultants have occasionally been hired to study problems which the

judiciary lacked resources to investigate--a measure not always satisfactory, since there are few consulting groups with experience in the judicial area. The Federal Judicial Center is statutorily authorized to perform a planning function. It could be, and in a small way is, the judiciary's "think tank"; but it has small resources, and has traditionally preferred to invest its time in projects of narrow, well-defined scope.

There is no one whose responsibility it is to forecast emerging problem areas and develop methods for avoid or mitigating those problems. In a sense, the Federal Courts Study Committee is an effort to fill that void. Such periodic high-level policy reviews should continue. However, we believe more should be done "in-house" by way of continuous long range planning, to develop the necessary data and options. No occasional effort can provide the information and insights that are needed.

The desirability of such a planning entity seems obvious to all of us, yet we see two vexing questions which must be answered prior to the establishment of such a unit. First, as there are in fact myriad organs within the judiciary engaged in some sort of planning, the new unit must have a reasonably defined role different from these to avoid overlap and to avoid jurisdictional disputes. And when such overlap and jurisdictional disputes arise, there must be a central authority, representing the judiciary as a whole, to settle them.

Second, the unit must be placed somewhere. It must be positioned in such a way that its efforts are sufficiently isolated from day-to-day management that its resources are not expended on short-term issues. On the other hand, it must have sufficient contact with operational units that its work is not abstract and that its proposals find their way efficiently into the mainstream of judicial planning and operations.

While a comprehensive definition of function is probably impossible, we offer a modest beginning. The long range planning unit we propose should concern itself with matters related to the overall activities of the federal judiciary rather than isolated problems. That is, it should, for example, be concerned with the manner in which the judiciary proposes and plans for the addition of new judgeships and should not be concerned mainly with the need for a new judge in a certain district or the need for a courtroom for that judge's use. It should develop policy proposals capable of broad application and should not be concerned with specific and isolated problems.

Examples may help to illustrate this definition. There has been a long-standing concern about intercircuit conflicts, yet no one was charged with the responsibility for gathering the data necessary for understanding that problem or proposing solutions to it. A long-range planning group would appropriately consider this. Better means for educating trial courts as to scientific matters might be another example.

An ad hoc committee recently studied proposals for increasing fees in the judiciary. That area is a sensitive one and it is tempting to agree to increase fees in certain areas simply to raise the funds necessary to properly operate the courts. Yet, such decisions ought to be guided by principles rather than made on an ad hoc basis. A planning unit could propose and incorporate such principles.

Basic questions about the operations of the public defenders system have been put before this Subcommittee. We have, in response, proposed a major study of this area. A long-



range planning unit might have the capacity to serve as a major resource for such a study.

In respect to placement, we believe the function ought to be placed in the Federal Judicial Center. As noted, the Center already fulfills such a function on a limited basis; it is statutorily authorized to do so. Moreover, the Center was given a separate board for the purpose of its having a measure of independence. There is the old adage that "operations drives out planning." Placement in the Administrative Office might lead to an emphasis on concerns related to somewhat isolated operational difficulties."

Since those views were first formed we have had correspondence with the Director of the Administrative Office. He argues that the adage about operations and planning is not necessarily true. Indeed, Executive Branch agencies, inherently operational, have planning units isolated from the demands of daily decision making, but some are so isolated as to be impotent. He further argues that the Center with its independent board is deliberately and appropriately outside the machinery of the Judicial Conference. Since the planning unit would of necessity need to have close association with the Conference and its committees, such isolation might be quite unwise.

We think there is much truth in these points. The chain of command in the judiciary runs from the Chief Justice through the Judicial Conference to the body of all judges. The Administrative Office and the Federal Judicial Center provide support within this hierarchy. If the planning entity we contemplate is to be integrated within the system as a whole, the Judicial Conference, which represents the judiciary as a whole, must be in a position to determine what issues to assign to it, and what to assign elsewhere. The Conference's Executive Committee is, in our view, the logical body to handle this control and allocative function. While, therefore, the personnel of the Center and its research standard would be subject to the control of its own Board, thus ensuring independence, the determination of what planning functions to assign to it would up the Executive Committee, or perhaps to a subcommittee charged with oversight of planning in the judiciary. Such a subcommittee might well include representatives from both.

What is needed, we think, is a somewhat new structure, whose boundaries we describe in general terms. The unit should be free from the demands of operational units and it should have ready access to the research capabilities of the Federal Judicial Center. Hence, administratively, it should be placed in the Federal Judicial Center. But, to provide access to the operational machinery of the judiciary it should report directly to a subcommittee of the Executive Committee of the Judicial Conference rather than to the board of the Federal Judicial Center. That subcommittee, charged with strategic planning, should include representation from both the Federal Judicial Center and the Administrative Office. It should have representatives of the major committees of the Judicial Conference and, importantly, should have access to persons outside the judicial branch who may be of assistance in formulating policy. These persons might be consultants or actual members of the committee.

These thoughts, reduced to a recommendation, yield the following:

The Judicial Conference should proceed with the establishment of a long-range planning function and should seek adequate funding from Congress for that function. This planning function should be located for administrative purposes in the Federal Judicial Center. The unit should report to a subcommittee of the Executive Committee

of the Conference whose membership should include both directors and appropriate Conference Committee members, and should have access to experts outside the judicial branch.

## **L. BUDGETARY ISSUES**

The Subcommittee received two memoranda from Judge William G. Young on behalf of the Budget Committee of the Judicial Conference. There is a general feeling, that there is a lack of adequate funding for the judiciary. This is demonstrated by the disparity between judicial responsibilities and the resources allocated by the Congress to discharge those responsibilities. The Budget Committee endorses two proposals to alleviate these problems. First, judicial impact statements should be mandated by statute so that the practical effect on the judiciary of pending legislation be formally and rigorously analyzed as a part of the legislative process. If an Office of Judicial Impact Assessment is established within the Judicial Branch, as we recommend elsewhere, that analysis could be done there and provided to Congress.

The second proposal involves the creation of law revision commissions. These would be charged with analyzing the fiscal impact on the courts of certain legislation and then recommending corrective action. Again, this function could be performed by the recommended Office of Judicial Impact Assessment. We so recommend.

One issue which merits discussion is the issue of revenue raising and garnering resources for the judiciary. This issue raises a fundamental policy question--are the courts of the United States to be a "free good" for American society in general, or should source resources requires user fees from those able to pay? Two areas of inquiry must be address in discussing this question: 1) a study of the manner and extent to which court fees actually limit access, and (2) a calculation of the actual per judge day cost of the operation of the United States courts.

To the extent that the federal courts are not to be a totally free good for our society, considerations ought to be given to measures for raising revenue which go beyond the access charge or filing fee. Possible revenue enhancers which merit study are (1) shifting all or part of the courts' actual costs onto the party to whom the fee is shifted; (2) assessing government agencies the full costs of judicial services; and (3) including a provision in sanction orders to recompense the judicial system itself for the abuse which warranted the sanctions.

There are several other areas for analysis which implicate the funding of the United States courts. These include: (1) expenses mandated by the Constitution; (2) the practice of basing the Judiciary's budget request on current services estimates as mandated by the Office of Management and Budget. Current services estimates provide funding at the current level of services without taking projected workload increases into account; (3) relieving the Judiciary of the costs of security; (4) consolidating the Administrative Office appropriation as a separate activity within the salary and expenses portion of the budget; (5) developing regional offices of the Administrative Office; and (6) developing one standard administrative operating procedure within the clerk's division of the courts.

These matters fit within the expertise of the Budget Committee of the Judicial



Conference. While there can be no question that fiscal issues have become dominant in the judiciary over the past few years, the same statement can be made of most other federal entities. The primary concern of the judiciary ought to be the proper presentation of its needs and the continuing explanation of those needs to the Congress. We believe that the Budget Committee is best suited to evaluate these matters and present them to the Judicial Conference.

**There is one area which the Subcommittee feels merits immediate action.**

Currently the Court of International Trade and the Court of Appeals for the Federal Circuit each submit their own budgets to the Office of Management and Budget, separate from the remainder of the judiciary. This is due to a historical anomaly which is inconsistent with the budgetary process for the other federal courts.

**The Subcommittee believes that it would be prudent and appropriate for these courts to fall under the same budgetary process as the rest of the federal judiciary. Hence, we recommend that legislation be enacted to correct this inconsistency.**

#### **M. PUBLIC AND MEDIA ACCESS TO THE COURTS**

For the first 48 years of its existence, the Administrative Office of the United States Courts possessed no official public information component. Inquiries, particularly those from the media, were handled on an ad hoc basis, although many were referred to the Office of Legislative Affairs or the Director's Office.

In 1987, a full-time Public Information Officer was hired by the Administrative Office, based in what has become the Office of Legislative and Public Affairs. The Public Information Officer has the responsibility of handling the public information needs of the federal judiciary as a whole and of the Judicial Conference. In addition he disseminated information to the courts and to the media through press releases and a newsletter. He has also assisted courts in organizing "press days" through which the media and the court meet to discuss and inform each other about their work, needs and concerns.

Many of the inquiries received by the Public Information Officer concern the activities of a particular court or judge. 28 U.S.C. 332(e)(8) states that the duties of a Circuit Executive shall include "Representing the circuit as its liaison to the...news media...." The mechanism for responding to media inquiries is thus decentralized, part of the responsibility being in the Administrative Office and part being vested with the circuit executives.

This structure seems generally appropriate but we believe that it is worthwhile to give somewhat greater emphasis to public information needs. Towards that end we make the following recommendations:

- 1. In each circuit either the Circuit Executive or an appropriate staff member should be designated as the media contact person and should receive training for that task. In addition, training for chief judges should include some media contact training.**

2. The concept of a "press day" should be encouraged as a means of facilitating communication between the courts and the media.
3. Support should be given to programs and publications that enhance public understanding of the courts and their operations.

The issue of cameras in the courtroom is theoretically on the agenda of this Subcommittee. We note that there is currently an Ad Hoc Committee on Cameras in the Courtroom established by the Judicial Conference. Rather than take a position on this issue, the Subcommittee preferred to defer to the Ad Hoc Committee, simply noting that while much of the interest in this area has been on televising trial proceedings, televising of appellate court proceedings presents rather different issues.

#### **N. SPACE AND FACILITIES**

Currently there is pending legislation in the Congress which would remove responsibility of court facilities from the General Services Administration and place that responsibility within the judiciary. This legislation was developed by the Space and Facilities Committee of the Judicial Conference in response to a long history of frustration by the courts in dealings with the G.S.A. Under the current structure, G.S.A. establishes the priorities for building and remodeling facilities. If it prefers executive branch agencies to the courts then the courts will take second place. The result is that an executive branch agency literally has the key to the courthouse. While G.S.A.'s expertise ought to be used by the courts, having that agency control the courthouse is problematic from both a philosophical and a practical point of view. The present legislation was approved on the Federal Judicial Conference at its September 1989 meeting.

The Subcommittee urges the Congress to allow the judiciary to become free of the General Services Administration and to contract for its own space and facilities, using the G.S.A. and other agencies on a contract basis when appropriate.

Although this would increase responsibility for court administrators, the flexibility and improved efficiency granted would over-ride any burdens. The proposal has been very carefully drafted with support and approval from the Administrative Office.

#### **O. FEDERAL JUDICIAL CENTER**

The Subcommittee recognizes the tremendous value the Federal Judicial Center represents to the judiciary. By providing education and research functions the Federal Judicial Center is invaluable. We recognize the importance of the Federal Judicial Center being independent from the daily operations of the Administrative Office. If the Federal Judicial Center were a part of the Administrative Office, the likelihood is that it would be swallowed up in the work of day to day operations. It was initially established as an independent agency precisely to avoid that possibility. We believe that our proposal on long-range planning will bring the two agencies into closer cooperation and that no further steps need be taken.

**We do not recommend that the Federal Judicial Center be merged with the Administrative Office. We see no continuing reason, however, for the statutory prohibition against selection of any members of the Judicial Conference to serve on the Center's Board.**

**One area of the work of the Federal Judicial Center which the Subcommittee views as meriting special attention is the role of providing continuing legal education for judges. Judges, like other professionals must periodically refresh their education to stay abreast of the latest advancements in the law. No other agency is more better suited to perform this function than the Federal Judicial Center.**

**We emphasize the need for continuing legal education and encourage the expansion and strengthening of the Federal Judicial Center's educational programs through the allocation of additional resources.**

#### **P. COMPENSATION**

**Law, rightly or wrongly, is a high-paying vocation in our society. The fact that federal judges receive salaries only slightly higher than those their law clerks can expect to receive upon leaving them, has an adverse impact upon the judiciary's ability to retain and secure the most highly qualified people. This impact is stronger in an era when, because of increase in caseload and legal complexity, judges must work harder and longer. The Judicial Conference has proposed to remedy the problem of inadequate judicial salaries in two ways. First, the Conference recommends that the Congress enact an immediate 30 percent pay raise. This would have the effect of restoring at least a portion of judicial purchasing power that has been eroded by inflation over the last 20 years. Second, the conference recommends that Congress institute an automatic cost-of-living adjustment for Federal judicial salaries, so that pay levels keep pace with inflation and large "catch-up" raises are obviated in the future. An automatic mechanism of this sort would eliminate much of the political difficulty attending recurrent congressional votes on the subject. These proposals have been introduced in the Senate (as S. 1667) and in the House of Representatives (as H.R. 2181). The Judicial Conference believes that these changes are singularly necessary to restore and maintain judicial salaries and to protect the institution of the Federal Judiciary.**

**It is our recommendation that:**

**The Congress should promptly enact legislation providing a substantial catch-up pay increase for Federal judges together with an improved mechanism for timely and adequate adjustments to maintain the proper relationship between prevailing economic conditions and judicial pay.**

#### **Q. JUDICIAL IMPACT**

**The Judicial Conference and the Administrative Office devote significant resources to legislative matters. Of necessity these efforts are focused on those bills which are sponsored by the judiciary or which directly impact on the operations or budget of the judiciary. These**

efforts, particularly in recent years, have been commendable. but we believe that an additional element is needed in conjunction with this program.

Much of the caseload spiral of recent years has resulted from a broad range of statutes which have created or implied new causes of action. The creation of a new cause of action is entirely within the province of the legislative branch. The judiciary is charged with the duty of providing a forum for these cases, however. Because of that it is appropriate and useful for the judiciary to advise Congress of the impact of new legislation on the judiciary and the need, if any, for additional resources to deal with the legislation. Such information to be useful and acceptable must be seen as being objective.

In the past, the judiciary has urged the requirement of judicial impact statements. We believe that the objectives of that proposal can be achieved by creating within the judiciary itself an office devoted to judicial impact assessment. This office ought to be located in the Federal Judicial Center but must of necessity operate in coordination with the Office of Legislative and Public Affairs at the Administrative Office. The advantage of placing this office in the Center is that it would be separate from operational entities and thus would be more likely to be perceived as being an objective agency rather than an advocacy agency. The danger in such a structure is the risk that the judiciary would speak to the Congress with two voices. Such a result is harmful to both branches.

To avoid that danger, we believe that the office should be so structured that it would not speak independently to Congress. For instance, Congressional requests for impact assessment could be routed through the Legislative and Public Affairs Office as could impact assessments themselves. The Legislative and Public Affairs Office would not serve as a censor in either direction but could, for instance, advise the impact assessment office of prior Administrative Office studies on the subject or Judicial Conference positions on the issue in order to avoid duplication or ambiguity.

The office would not endorse or condemn legislation. It would confine itself to an analysis of the impact of the legislation. That impact assessment would often be in the form of needed resources. In addition, though, the office could advise the Congress of drafting defects that might unnecessarily breed litigation such as a lack of a statute of limitations or uncertainty as to whether a private right of action was intended. Finally, the office would supply assessments useful to the Judicial Conference Committee on planning discussed in Part K, *supra*.

We recommend that an Office of Judicial Impact Assessment be created in the Federal Judicial Center. That office would be charged with advising Congress on the resource impacts of proposed legislation as well as offering technical assistance on drafting matters likely to unnecessarily lead to litigation. The work of this office must be closely coordinated with the Office of Legislative and Public Affairs, perhaps by having the latter office serve as the conduit for communications.



## **II. APPELLATE PROBLEMS**

The nation's appellate court system consists, besides the Supreme Court, of twelve regional courts of appeal (circuits 1-11 and the D.C. Circuit). It also includes the Federal Circuit located in Washington, D.C., which reviews certain cases by subject matter, including appeals from patent cases in all district courts, from the Claims Court, and from the Court of International Trade. These comprise all the appellate courts created under Article III of the federal Constitution. Other appellate bodies, such as the Court of Military Appeals and the newly-formed Court of Veterans Appeals, are associated with certain executive functions and, are regarded as having been created under Article I of the Constitution. While the Article I courts are relevant to our study, the present section focuses only on the Article III appellate courts, and especially on the regional circuits.

Our present system of regional circuits was laid out in 1891. Beginning with only three judges, the courts in each circuit ranged in size by 1950 between three and seven judges, with an average of only five judges. These courts still continued the practice of sitting in panels of three judges. Relatively infrequent "en banc" sittings were held to review serious and potentially divisive cases. Through the 1950's, and to a lesser degree up to the present, a court of appeals could be viewed as a unitary tribunal. Its small size and intimacy made possible the belief that, even though it sat in rotating panels of three, the court was physically a single unit, much like the appellate courts that headed each state.

The issues facing the circuit court system as it enters the 1990's, arise from the extraordinary growth in the number of appeals. This growth has not been limited simply to the 177 percent growth since 1945 in district court filings. Since 1945, the rate of appeals has risen from one appeal for every 42 district court terminations, to one appeal for every seven such terminations (1989). As a result, filings in the courts of appeals have risen astronomically by 1,355 percent, or nearly fifteen-fold. During this same period the number of appellate judges has increased by a factor of three, from 59 to 156. An individual judge's share of the caseload has, therefore, multiplied by a factor of six over the same period.

This exponential growth has impacted on the federal circuits in three ways: (1) it has increased the caseload per appellate judge; (2) it has increased, and will further increase, the number of judges on the courts of appeals; and (3) it has decreased the percentage of all appeals which the Supreme Court is able to decide, causing an increasing proportion of federal law to be decided, sometimes inconsistently, at a regional level. Each of these effects has important implications, which we will discuss in turn.

### **A. INCREASE IN APPELLATE JUDGE CASELOAD**

The number of appeals per appellate judgeship has risen steadily. In 1945 there was an average of 26 appeals pending per judgeship. By 1970, 91 appeals were pending per judgeship. By 1989, 192 appeals were pending per judgeship, six times the number pending per judge in 1945. Another revealing statistic is the number of case participations per judge. Judges sit in panels of three, and in 1965 each appellate judge, nationwide, participated in an average of 136 terminations (the number varied from 85 in the Eighth Circuit to 207 in the Fifth). In 1989, the average number of participations had risen to 382 per judge (varying from



a low of 208 in the D.C. Circuit to a high of 530 in the Eleventh). Divided by three, the resultant figure equals the number of cases terminated that year per judge. Thus in 1965, per judge terminations averaged 45, while in 1989 per judge terminations had risen to an average of 127, almost three times as many.

What do these figures say about today's appellate workload?

They clearly show that the number of cases for which each judge is responsible is not only at a record high, but is at a level so high that judges of the 40's and 50's would have found it incredible. The figures also show that, at this moment, in every circuit except two (the D.C. Circuit with 208 and the Second Circuit with 254), the number of cases in which each judge take parts exceeds the number (255) which the federal Judicial Conference uses as the standard for determining an appropriate annual workload for one appellate judge. As we discuss below, the 255 participations formula, standing alone, is a less than perfect indicator. Nonetheless, it certainly has some broad validity. The number is actually higher than the 225 merits participations per appellate judge which was found to be an appropriate workload by three knowledgeable experts who carefully considered the matter in 1976. Paul D. Carrington, Daniel J. Meador and Maurice Rosenberg, *Justice on Appeal*, (West 1976). In our Committee's poll of circuit judges, most judges responded that 225-255 merits participations was "about right" as an annual workload standard per judge. Certainly in circuits such as the First, Fourth, Fifth, Sixth and Eleventh, where per judge participations in 1989 were 377, 497, 461, 479 and 530 respectively, there can be no doubt that the caseload per judge is excessive, even grossly so.<sup>1</sup> Our view is fortified by workload figures we have reviewed from the intermediate state appellate courts showing that the federal appellate caseload is higher than that of many of the former, even though the responsibilities of the federal circuit judges would seem greater.

While filings and workload have thus risen (and keep rising) astronomically, the courts of appeals have paradoxically remained current. The median time nationally for processing an appeal, from filing the appeal to disposing of it, was a little over ten months in 1989, a few days lower than in 1980, and not much higher than it probably was in the 1940's. There is no real backlog (although it is possible to argue that several of the slower circuits have a small backlog). To their credit, the federal courts of appeals remain among the most prompt appellate tribunals in the nation. For this reason, many people think that the caseload is not excessive.

We believe, however, that there is a problem, not a backlog problem, to be sure, but a problem growing out of the danger that the high ratio of caseload to judges, may erode the quality of the courts' work. Courts of appeals are more flexible than trial courts in respect to the number of cases they can process before developing a backlog. Beyond a certain limit, trial courts simply cannot shorten trials; if given too many cases, they become backlogged. But an appellate court's only bench time, that devoted to hearing argument, can be reduced or, in

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<sup>1</sup>The revised judgeship bill filed on behalf of the Judicial Conference, based on 1987 statistics, requests sixteen new judgeships for the circuits. These numbers will doubtless be revised upwards in light of more current (1989) figures. The Eleventh Circuit, although clearly entitled to more judges, has declined to request any because of concerns over the lack of collegiality and other problems connected with circuit growth. See Section B, *infra*.

some cases, eliminated; and there are many measures available for prioritizing and cutting down the judges' involvement in researching and writing appellate opinions. It is by use of such techniques that the federal appellate courts have managed to keep current in the face of burgeoning caseload.

In recent years circuit judges have benefited from resources which have enabled them to be more productive. They now have three law clerks. They have been provided with staff attorneys ("central staff") at the ratio of one per judge. Many courts have initiated innovative settlement programs. In one or another way, virtually all federal courts of appeals today screen their dockets, channel some cases into non-argument tracks, and quickly identify the weaker cases for summary disposition. These techniques have been successful in utilizing judge-time more efficiently, and, up to a point, need have no adverse effect at all upon the fairness and reliability of the courts' work. It is obvious, however, that these techniques involve trade-offs which must be carefully controlled. Since 1975, the number of appeals decided without oral argument has risen from 30 to 50 percent nationally. In circuits, 67 percent of appeals are decided without oral argument. In most circuits, cases submitted on briefs are decided with a reasoned opinion of some type, usually unpublished. However, in three circuits, many unargued appeals are disposed of without stated reasons.

These efficiencies, which have enabled the courts to keep current, have been aimed at giving to every case its proper share of attention, but no more. They are analogous to procedures in many other areas of modern life designed to use scarce resources, such as the valuable time of a physician, economically and efficiently. Given the sharp rise in the rate of appeals, including such facts as that criminal appeals are today underwritten by public funds, it is reasonable to expect an increase in the proportion of frivolous or, at least, weak appeals. The Subcommittee believes that the appellate courts have responded properly to the rise in caseload by organizing their resources so as to use the time of judges as efficiently as possible. We commend the federal courts on the initiative and innovation they have demonstrated in keeping abreast of their commitments.

There are, however, obvious dangers. The danger point is when judge-time becomes stretched so thin that, for lack of time, cases are decided with insufficient thought, and decisions of precedential importance are written carelessly. Workload pressures may cause non-writing judges to acquiesce too readily to the draft of the writing judge, without themselves providing constructive insight and criticism. Writing judges could be forced into settling for superficial and sloppy products. Overtaxed to that extent, appellate courts could do serious harm, not only in rendering ill-advised decisions but in producing ill-considered case law. These would be serious defects in a justice system upon which modern society depends not only to decide controversies but for the interpretation of its laws. While the Supreme Court is the arbiter in the greatest matters, the growth in appeals has diminished the Supreme Court's ability to decide all the important cases, leaving many of them up to the circuits.

While we emphasize that no breakdown in quality of the type mentioned has come to our attention, we believe that the productivity levels of many of today's circuits are at maximum levels. Delay in adding judgeships while caseload continues to escalate could undermine their ability to function properly. We urge Congress to address the problem of needed new judgeships.

Determining how many judges each circuit needs is not simple, although we think the Judicial Conference's judgments in the cases of the circuits with the highest caseloads are well within proper bounds.

One step that would help in gauging future and present judgeship needs is to develop a more sensitive and sophisticated workload index than the simple 255 participations rule described above. We recognize, of course, that the 255 participations rule has been employed in conjunction with other factors, including advice from the judges. Nonetheless, we believe that Congress and the courts would be assisted by development of a better indicator, if one can be devised, which takes into account case types. The mix of cases varies greatly among the circuits. It seems unrealistic to treat social security appeals as requiring the same average investment of judge-time as securities or civil rights appeals. Presently the only weighting the Judicial Conference undertakes in utilizing the 255 participations per judge index is to treat prisoner petitions as one-half a case. For some time, however, the Judicial Conference has used a weighted caseload index in determining the judgeship needs of the district courts. The latter formula is not yet entirely satisfactory, and is undergoing further study. Still, we think that a weighted formula is preferable to pretending that cases in all categories require the same amount of judge-time. There may also be other indices that could be developed to assist in better determining judgeship needs.

To devise such a formula will require research into the time actually spent by judges to handle appeals of various kinds. Both the formula itself and the research that precedes it, will help provide more reliable means for striking a proper balance between the number of judges needed on a court of appeals and the court's workload. It will suggest how many cases a judge can handle. Especially is this important where, given modern case management techniques, a backlog will not necessarily occur to warn that a court is underjudged. We cannot permit the efficiencies that are being built into the process to submerge the basic need for enough judges. It has been the hallmark of the judiciary that judges do much of their own work. While modern methods have properly added more staff assistance to the process, the judge remains the central decision maker. We must not give appellate judges a caseload so large that they either surrender their decision-making to staff or also decide cases under such pressures for haste as to be incapable of thoughtful and just decision-making.

The Subcommittee, therefore, emphasizes its belief that the courts of appeals today are, in general, at full capacity, and that many of the circuits, especially those already identified by the Judicial Conference as having need for the larger numbers of new judgeships, stand in immediate need of more judges. For every court there is a minimum number of judges necessary to handle the caseload. Unless there is a prospect of a corresponding caseload reduction, we do not favor maintaining a static number of judges to handle a caseload that has escalated beyond that group of judges' capacity. Where courts are overstretched and where appropriate caseload reductions are not realistically in prospect, we know of no responsible course other than the addition of judges.

We reserve for the next section a discussion of whether the circuits can keep down judgeship needs down if Congress permits them, on a discretionary basis, to limit the number of appeals they will hear. Whatever might be done along these lines, we presently accept that, by using the techniques now being successfully employed by the circuits, such as by screening appeals and disposing of the more routine ones without oral argument, it is possible and proper to handle a greater volume than might have been deemed appropriate a decade or more ago.



And with the aid of a sophisticated workload formula, developed after careful study, it will be possible to determine more reliably what a circuit's bottom-line judgeship needs are.

Nonetheless, we underscore our warning that there are finite limits to the numbers of appeals a given number of judges can properly handle. And we warn that limit may already have been reached in one or more of the circuits. Beyond this limit, the quality of the court will inevitably deteriorate even though the court remains current. Defining and recognizing that limit, and seeing that it is not exceeded, is absolutely essential if the courts of appeals are to survive as reliable components of the federal legal system.

**We accordingly recommend as follows:**

**(1) That the Congress take immediate steps to address the demonstrated needs for new judgeships of the various circuits, as well as of the district courts. This action should be based on formulas currently in use, as supplemented by the best judgment of the Judicial Conference and its advisors.**

**(2) That the Judicial Conference take immediate steps, on an expedited basis, to institute a study to create the most reliable caseload formula that can be devised for determining the judgeships needs of the circuits, taking into account the varying types of appeals handled in each circuit. We urge Congress to provide the necessary resources and funding for such a project.**

**(3) That recognizing the harm to the nation that can result from overburdened courts lacking in a sufficient number of judges, that the Administration and Congress expedite the filling of all existing vacancies for circuit and district judges.**

**(4) That the Judicial Conference initiate the creation of an intercircuit study project, perhaps under the aegis of the Federal Judicial Center, to exchange information between the circuits, and conduct studies, as to the most effective and reliable means for appellate case management, towards the end that all circuits have available the most up-to-date thinking and information as to how to manage today's high volume courts while maintaining the highest quality.**

## **B. INCREASE IN THE NUMBER OF JUDGES**

The Hruska Commission in 1975 expressed great concern over the growth of circuits in excess of nine judges. Commission on Revision of the Federal Court Appellate System, "Structure and Internal Procedure: Recommendations for Change," 57-59 (June 1975). Consistent with this philosophy, it urged the division of the Fifth and Ninth Circuits. The Fifth was divided in 1981. The Ninth successfully resisted change, and today operates with 28 authorized judgeships. Ironically, only a few years later, both the Fifth and the Eleventh (which was created from the Fifth), now have caseloads that could soon bring them to 20 or more judges. The Sixth faces a like situation, followed by the Third and Fourth. The number of appellate judgeships has risen nationally from 59 judges in 1945 to 156 in 1989, a three-fold increase. The average size of a circuit court of appeals has risen from five judges in 1945 to 13 judges in 1989. As of today, the circuits' authorized judgeships are as follows: D.C., 12; First, 6; Second, 13; Third, 12; Fourth, 11; Fifth, 16; Sixth, 15; Seventh, 11; Eighth, 10; Ninth,

28; Tenth, 10; Eleventh, 12. Applying the 255 participations formula now in use by the Judicial Conference of the United States to determine new judgeships needs, *supra*, the circuit courts would theoretically need 50 additional judges to handle their 1989 caseload, or a total of 206 judges. If this number of judges were, in fact, realized, the "average" court of appeals today would have 17 judges.<sup>2</sup>

Our Subcommittee has secured alternate projections, based on caseload, of future judgeship needs utilizing the 255 participations formula. Assuming appellate caseload rises in the next five years at the same rate as it has from 1960-89 (the most conservative of several projections), a total of 280 judges would be required in 1994. This would raise the per circuit average to 23 judges. (Three circuits would have over 30 judges, and one, the Ninth, would have 43.) This same projection would predict a need for 315 appellate judges in 1999 (26 per circuit, with the Fifth at 39 and the Ninth at 49), and 392 judges by 2009 (33 per circuit, with the Fifth at 49 and the Ninth at 61 judges). If the future judgeship increase is projected on the basis of trends from 1970-89, a larger increase occurs: 288 judges are needed by 1994; 332 by 1999; 423 by 2009. Under this projection, the average circuit should have 24 judges within five years; 28 within ten years, and 35 within 20 years. The Sixth would reach 46 judges within 20 years, and the Ninth 67.

The burgeoning caseload has thus caused a sharp increase in the needed number of circuit judges. Many of the circuits could reach 20 or more judges within a few years.

An initial question is whether to adopt the Hruska Commission's goal to keep each circuit's size to nine judges or thereabouts. We think it would be premature to adopt such a goal now, although we think that within a few years a decision will be required. There are several reasons for postponing any immediate response.

First, caseload growth has been so great to date that any decision to aim for a permanent system of small circuits would involve dividing and reorganizing not only the Ninth but the Third, Fourth, Fifth, Sixth and Eleventh. Indeed, it is difficult to see how the circuits could be reduced simply by dividing the present circuits. Rather it is more likely the present circuits would have to be scrapped, and a completely new set of circuits devised, probably with

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<sup>2</sup>Broken down, the new judges under that standard, based on 1988 statistics, would be as follows: D.C. Circuit, 0; First, 2; Second, 0; Third, 5; Fourth, 8; Fifth, 8; Sixth, 9; Seventh, 1; Eighth, 2; Ninth, 2; Tenth, 3; Eleventh, 10. These numbers are much greater than the 16 judgeships requested by the Judicial Conference in its pending judgeship bill (revised to include the Sixth Circuit's recent request). The number in that bill is derived from lower 1987 statistics. Besides considering the 255 participations formula, the Conference, in drawing up that bill, reviewed other factors affecting the circuits, including the views of the judges. A Conference committee is now in process of drawing up judgeship needs based on 1989 statistics. We note that the judges of the heavily burdened Eleventh Circuit declined to request any new judgeships pending the report of this Committee. The Sixth, on the other hand, after initially voting not to request additional judges, reversed its position in 1989. Other circuits requested fewer judges than the 255 participations rule would allow. The circuits' reluctance to request new judgeships reflects a resistance to growing larger. It could also reflect genuine weaknesses in the 255 participations formula, where caseload growth may reflect case types not requiring as much judge-time.



some built in mechanism for periodically reorganizing them so as to maintain the number of judges in any one circuit below the maximum established. There is no constitutional reason not to do this; the lower federal courts have been thoroughly reorganized several times during our history. On the other hand, the effort and disruption involved would be enormous. A fundamental change like this should only be recommended if it is clearly the right step. Yet for the reasons stated below, we need to know more before we can say that the creation of twenty or more smaller circuits is the most desirable future course.

Second, the creation of a system of small circuits is only workable if a mechanism can be devised to handle the problem of intercircuit conflicts. As pointed out in the next section, the growth in appeals has created more and more instances where different circuits rule differently as to the meaning of federal law. Moving from thirteen to twenty or more circuits can only exacerbate the problem. As we discuss in the next section, it is necessary to learn more about the relative seriousness of this problem and, specifically, what cases are most troublesome, and their numbers, if we are to deal with it. There is more to be learned, in addition, about mechanisms to cope with it. Thus we recommend in Section C, below, a four-year pilot project overseen by the Supreme Court, along with an intensive study of the problem. If our recommendations are followed, requirements of controlling intercircuit conflicts in a system of regional circuits will be far better understood than now. It could be that with the knowledge and techniques learned it will turn out to be possible to subdivide the appellate judiciary into more numerous circuits, using intercircuit panels and various national stare decisis rules to resolve conflicts. On the other hand, it may turn out, that twenty or more circuits would not be manageable, if made into the lower tier of a two-tier federal appellate court, the upper tier of which might be four or five higher tribunals, each of which would have discretionary appellate jurisdiction over four or five of the circuits. This upper tier would thus be inserted between the circuits and the Supreme Court. Such a multi-level plan, whatever its merits or demerits, more plainly what such a step might entail.

Third, the ability of the Ninth Circuit to manage with 28 judges also gives us pause, since it is possible that a large circuit is more feasible than once believed. Viewing the Ninth Circuit as an experiment in the management of a "jumbo" circuit, we think it worth letting more time go by before determining finally whether larger circuits are, indeed, unworkable. The Ninth insists that it is managing well.<sup>3</sup> Many of its judges agree.

We recognize that a large majority of judges outside the Ninth (and some within) disagree with the proposition that bigger is better. Three quarters of the circuit judges who responded to the Committee's poll indicated that, in their view, 15 or fewer judges was the outer limit of a properly and effectively functioning circuit court of appeals. Many put 12 or even nine as the outer limit.

The debate between the Ninth and the small circuits is a contest between two very different concepts of a circuit court. The Ninth is essentially a rotating system of three-judge panels (over 3,000 combinations are possible) covering an enormous geographic area and bonded by a very capable administration and the nation's only small (11 person) en banc. (Its

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<sup>3</sup>See Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1978, submitted by The Judicial Council and The United States Court of Appeals for the Ninth Circuit (July 1989).

willingness to accept a small en banc, a mechanism recommended by the Hruska Commission, may be a key to its ability to operate, since the virtual impossibility of large court en banc procedures was one of the reasons the old Fifth agreed to split.) Other circuits still prefer the traditional concept of a small, unitary circuit court even as their growth increasingly belies that image. Such a court has been characterized by intimacy between the judges and projects the powerful personalities of its regular members. The Ninth has either found a workable alternative to the traditional model, or else the entire appellate system as it now exists must shortly be restructured, since other circuits are soon destined for "jumbo" status (unless some method of controlling caseload is adopted). Professor Arthur Hellman, who has just studied in detail the question of intra-circuit conflicts in the Ninth Circuit, reports after studying a quantity of Ninth Circuit decisions that the panels of that circuit have been faithful to stare decisis, and that the en banc has acted effectively when required. "Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court," 56 U. Chi. Law Rev. 541 (1989). He concludes that the Ninth is not at all torn by intra-circuit conflicts.<sup>4</sup> The Ninth itself insists, in its latest report, that it should be regarded as the harbinger of future circuit courts rather than as anything abnormal.

We believe that more study is needed, as well as more opportunity for debate among bench and bar, before this issue can appropriately be resolved. The experience of the Ninth shows that, with good leadership, a large circuit can at least keep current and do its job. This encourages us to believe that, at least, for the next five years, the present system is capable of absorbing the caseload, and taking on such additional judges as Congress provides, while further thought is being given to a future course of action.

We do not mean to suggest that our Subcommittee views the only options to be small versus large circuits. The Subcommittee has studied the following alternatives:

1. Adoption of a certiorari system, permitting each circuit to control the number of cases it reviews (i.e. abolish appeals of right in some or all types of cases).
2. Abolishing the present circuits, and replacement with one of several new structures.
3. Retention of the present system, with, perhaps, study of further innovations to make the "jumbo" circuits of the future more manageable.

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<sup>4</sup>One piece of data contrary to Professor Hellman's report is found in the answers by Ninth Circuit district judges and attorneys to a survey published in July 1987. Asked if they agreed with the statement "There is consistency between panels considering the same issue," 59 percent of attorneys and 68 percent of district judges disagreed. Many respondents felt strongly that there was not consistency. Professor Hellman acknowledged a degree of inconsistency in those Ninth Circuit cases where the governing legal rule permitted a court to apply a variety of judgmental factors, of a type that could vary person-to-person. Since his study did not attempt to compare the Ninth with smaller circuits, which presumably might also reflect different judgment calls in such matters, it is difficult to assess whether the Ninth differs in this respect from other circuits. As the Supreme Court itself indicates, small size does not guarantee uniformity of view.

The Subcommittee has looked into all these possibilities with as much care as its short timetable allows. It has read the literature, diagramed and even invented various new structures and considered some of the pro's and con's. Alternatives 1 and 2 would require fundamental changes in the judicial system. The choices are difficult and we see few benefits in attempting to select one specific change now rather than inviting further consideration of the entire matter during the next few years.<sup>5</sup> For reasons already discussed, more time will assist in assembling needed information. In addition, it could be that other proposals of this Committee will result in a reduction in appellate caseload thus relieving some of the pressures for change or at least tipping the scales toward a different alternative. Less likely, but still perhaps possible, fundamental changes in society or in the economy would bring about such a reduction. And, finally, we believe that it is desirable to bring members of the bench and bar more fully into the discussion. The federal courts of appeals are, in a sense, victims of their own success. They have kept efficient and current. Few outsiders, even now, appreciate the gravity of the problem. The pressures in circuits like the Third, the Fourth, the Fifth, the Sixth, and the Eleventh are just now being strongly felt by their judges; and if the caseload numbers persist in going up, as seems likely, it will surely be apparent before long that many circuits must either be operated at "jumbo" size, or else a whole new approach or structure must be adopted. We strongly urge that in the time remaining, which we estimate as within the next five years, that the Congress, the courts, bar groups and academia give serious thought to the problem and to the alternatives.

In the remaining part of this section we shall discuss the parameters of the available alternatives, as we see them. By describing them briefly, and by including in our Appendix (now consisting of our blue binder) some of the materials developed with respect to each, we hope to help orient the readers as to what, after consideration, we believe to be the practical alternatives. It is among these options that choices will have to be made within a relatively short time.

#### 1. Should a system of circuit court certiorari be adopted?

A simple way to control the rising appellate workload would be to give to each of the courts of appeals the option now possessed by the Supreme Court to control its own docket. The Supreme Court, with a fixed number of justices, hears about 150-160 cases a year. This number does not change, even though the number of petitions for certiorari may and does change. By using the same method, courts of appeals could tailor to their own resources the number of appeals taken under advisement. The courts of appeals would develop rules and a screening procedure which would enable each of them to decide what cases to hear and what to reject. Whether to include criminal cases in the process would have to be addressed. Conceivably the screening procedure could include a requirement that all appellants first seek the district court's approval to appeal, much like the certificate of probable cause required in

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<sup>5</sup>We accordingly take no position on the question of splitting the Ninth Circuit. As an isolated question, that involves issues peculiar to the region which we are not qualified, in the time and with the resources we have been given, to address. Insofar as the question turns on whether, as a general principal we disfavor circuits of that size, we think an answer would be premature, since it would require us to determine now whether a major reorganization touching upon all or most of the circuits in the nation is desirable. As noted above, that is an extremely difficult puzzle, the pieces to which are not yet all available.



habeas cases. While the court of appeals could still grant review if the district court declined approval, the view of the lower court might be a helpful factor, since, having lived with the case, the trial judges will know whether it is clear or close.

To study discretionary review, the Subcommittee requested Kathy Lanza, Esquire, to prepare a paper which is included in the Appendix. This paper includes a survey of the approaches taken in the three states having discretionary review: Virginia, West Virginia and New Hampshire. It also considers the experience of the United States Court of Military Appeals, and refers to the principal literature. We refer any interested reader to this paper.

The argument against discretionary review is that it must be somewhat pains-taking unless it is to do violence to the tradition of appellate error correction. Lower appellate courts, unlike the Supreme Court, obviously cannot assume that ordinary errors have already been corrected. Granting or denying certiorari cannot, therefore, turn simply on identifying the presence of an important precedential issue. To determine if error could have occurred below, an appellate court will have to conduct a fairly comprehensive examination, aided by briefs and by the trial record. The amount of time spent in this searching kind of inquiry may be just as great as the efforts a circuit court makes today in identifying cases for possible summary disposition. In other words, a careful certiorari procedure might save little if any of the time now spent. Moreover, there would be the danger of spending time twice: first to consider whether to allow review, and later, if review is allowed, to decide the case.

On the other side, a certiorari procedure can be tailored almost infinitely to the needs of the system. If the caseload were overwhelming, the grant or denial of certiorari could be turned into a less sensitive process. The judges would not be obliged, as they are when handling a true appeal, to satisfy their consciences that they approve or disapprove of a particular outcome. "Certiorari denied" could simply mean: "We don't have room, and your case seems less troublesome than others."

Conceivably certiorari could be combined with procedures such as truncated review of a colleague's case by one or two trial judges, as a condition for seeking certiorari. The difficulty with such a procedure would, again, be that the administrative costs, and judge-time, could well be greater than the fast-track time presently spent by a circuit court on many of its cases.

One thing is clear. While the Supreme Court has never held that an appeal is constitutionally required, the federal system and virtually all state systems now provide one appeal as of right to all litigants. Alteration of that tradition, even if in the civil area alone, would be a major change in our philosophy. It might conceivably become a needed step if the costs of providing an appeal in each case become too high. But the screening and tracking techniques now used by appellate courts may be adequate. The Subcommittee sees adoption of certiorari review as an action of last resort, and does not now recommend it. It should, however, be studied because it is an obvious alternative to building a costly, more elaborate appellate structure should caseload pressures prove intractable.

## **2. Alternative Circuit Structures**

The Subcommittee has spent considerable time studying, developing and diagramming a variety of alternate structures to the present circuit system.

The current system was established by the Evarts Act in 1891. As we have already said, it need not be regarded as engraved in stone, although many people tend to see it as such. The day has already come (except, perhaps, in the First Circuit, which has six judges), when the traditional small circuit court that characterized the first 70 years of the system has been irrevocably lost. Circuit courts operating with even 13, 14 or 15 judges cannot hope to be the small, unified collegial bodies of yester year. A court like the Ninth Circuit, with 28 judges, is an entirely different institution.

It can be argued that when an institution that has served well has been changed beyond recognition, it should be abandoned. Certainly no one would institute from scratch a federal system with circuits ranging, as now, from six to 28 judges and reflecting, geographically, even greater discrepancies in circuit sizes. On the other hand, the present circuits are functioning; the judges and administrators have adapted to the peculiarities of each circuit; and it is quite possible that the trade-offs between having twenty or more smaller circuits or having the "jumbo" Ninth circuit, and the soon to be "jumbo" other circuits, militate against change. About all that can be said is that no system, whether the present one or any of the alternatives we have considered, can recapture the past. All must reflect the enormous growth in caseload and the many more judges that the modern era demands.

We are presenting as an Appendix to this subpart a binder reflecting the structural alternatives we have discussed. There are essentially four types of structures (besides keeping the present format) of particular interest, although each type has many possible variations, and it is possible, also, to meld types.

**Type I.** To achieve small circuits the present circuits would be eliminated and entirely new circuits drawn, limited to nine, twelve or fifteen judges each. Problems of geography might be troublesome; states might have to be split. To cope with future caseload growth such as overtook the Eleventh and Fifth Circuits only a few years after their division, a mechanism might be developed for examining and, if needed, redrawing circuit boundaries every decade or so, in order to maintain a proper size. The problem with any such restructuring, as already stated, is how to control the increase in intercircuit conflicts that a larger number of circuits would surely create. Numerous ways of doing this have been suggested.

One method would be to require each circuit to adhere to the precedent of others, except where the Supreme Court has spoken. However, this rule of national *stare decisis* would have to be ameliorated by an opportunity to break away from the decisions of other panels believed to be clearly erroneous. One proposed method would be to create intercircuit review panels of some type which would have the power to resolve conflicts finally (subject to Supreme Court review). Another would be to grant nationally binding status, in certain circumstances, to the opinion of en banc panel of a particular circuit. The important point about arrangements of this type, would be that judges from the circuits would themselves be utilized, in some formalized manner, to issue pronouncements binding on colleagues beyond their own circuits. Intercircuit conflicts could thus "be cut off at the pass," without total reliance on the Supreme Court as the sole arbiter. There would, be no "second tier" or other formal court structure between the circuits and the Supreme Court.

Another quite different structure for policing the intercircuit conflicts that multiple small circuits will create would be to integrate the circuits into a fully developed two-tier appellate court system. The twenty or so circuits would become the bottom tier. The upper



tier would consist, nationally, of four or five "higher" tribunals, consisting of perhaps seven judges each. Each new upper tier court would have its own geographical area comprising four or five of the circuits from which it would hear appeals on a discretionary basis. A possible advantage of the above system would be to channel the major law-declaring function below the Supreme Court to a few major tribunals. This would displace the voluminous and perhaps increasingly disparate case law that 200 or 300 co-equal circuit judges, governed only by a distant Supreme Court, might be expected to produce. The lower tier circuit judges would still do important work, especially in the area of error correction. But the relationship between the two tiers would be somewhat like that in states today between the state's highest court and the intermediate appellate courts. This analogy is imperfect, of course, in that the Supreme Court would remain head of the federal courts. Still, with Supreme Court review relatively rare, the new upper tier would have an important supplementary role. This system could absorb the many more judges that will soon be needed, while preserving coherence.

Type II. Another alternative is to create national subject-matter courts so as to relieve the regional circuits of much of their current caseload. The national exponent of subject-matter appellate courts is Professor Daniel Meador, an advisor to the Subcommittee. Professor Meador is chairman of the American Bar Standing Committee on Federal Judicial Improvements which, in March of 1989, issued its report entitled "The United States Courts of Appeals: Reexamining Structure and Process after a Century of Growth." In this report, the majority recommends what it calls "non-regional appellate courts defined by subject matter," principally a national court of tax appeals and a national court or courts to hear some administrative appeals. Subject matter panels in the regional circuits are also recommended. A significant advantage of subject matter courts of appeals is that they eliminate intercircuit conflicts, provided all appeals of that type can be handled by one upper-level subject-matter court.

Professor Meador has explained his own views more recently in an article entitled "A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Court of Appeals," 56 U. Chi. Law Rev., 603 (1989). While many bar leaders and judges oppose what they call "specialist courts", Professor Meador points out that his concept is not limited to specialized courts but includes courts like the Federal Circuit and, in some areas, the D.C. Circuit, which are composed of generalist judges whose jurisdiction is defined, at least sometimes, by the subject matter of the cases. The existence of these and certain Article I courts indicate that subject matter courts already have a recognized place among the country's judicial institutions.

However, the Subcommittee has difficulty seeing subject matter tribunals as providing major relief for the present circuits. If the elements of the ABA standing committee report were adopted, they would affect only a small portion of the caseload. And a wider creation of subject matter courts would, in our view, raise numerous political and organizational issues. The concept is nonetheless worthy of continuing research and study, especially as there are undoubtedly types of cases best handled by subject matter tribunals. For example, an Article I tribunal to handle all entitlement appeals such as Social Security, Veterans' benefits, and the like seem well worth considering. Finding an executive agency within which to place such a unified Article I Tribunal is something of a problem. The Office of Budget Management might be a possibility.

Professor Meador has designed an interesting amalgam of the two-tier regional system mentioned under Type I with a group of subject matter courts (see Appendix).

**Type III.** Efforts have been made to create models of a single national appellate court, i.e. one lacking in circuits or other sorts of separate regional entities. Professor Carrington's interesting description of one such model is contained in the Appendix, along with a diagram our Subcommittee has prepared. The Subcommittee's initial reaction is to fear that a single, nationwide structure would have the faults typical of a large bureaucratic agency. The circuit courts have responded with considerable initiative to the demands of the last 20 years. We believe that this initiative stemmed in part from the feeling of judges and administrators in particular locales that the challenge was their challenge requiring their response. Had they been part of a nationwide bureaucratic structure, the commitment might have been less. The modern trend in the federal courts, which we approve, has been towards decentralized administration.

There are however, advantages to a nationwide entity, one of which is the ability to divert judges and resources to places of particular need. Another would be the control of intercircuit conflicts. A feature of Professor Carrington's model is to distinguish between panels handling routine, fact-specific disputes and those handling cases where law-declaring would be required. Only in the latter would there be written opinions. The model also relies extensively on subject matter panels.

**Type IV.** It has been suggested by Judge J. Clifford Wallace that the circuits might be reduced to several "jumbo" circuits. "The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill," 71 Cal. Law Rev. 913, 940-41 (1983). He notes that this would curtail intercircuit conflicts, and that the larger circuits could more easily shift resources within their borders. Such a system might call for the creation of intra-circuit divisions; would require small en bancs to function effectively; and might require further innovations – such as strengthening the en banc so as to transform it into something closer to a supervisory court within a court. If the nation were divided between, say five "jumbo" circuits, the structures created within each circuit might have the effect, when added together, of creating, nationwide, something like the two-tier regional system described under Type I.

We doubt that a move to merge smaller circuits would command widespread support. We mention it only to point out the need for further study of the possibilities inherent in a large circuit.

There are endless variants on the above four types: we think that they, however, suggest in a general way the concepts that are available. In Section C, *infra*, in discussing the control of intercircuit conflicts, we refer to another type of arrangement aimed specifically at resolving conflicts in the current system.

### **3. Keeping the Present Circuit System**

As we have said, it is hard to imagine setting up the present circuits from scratch today. Not only are their sizes and territories quixotic, their increasingly large courts, sitting in shifting panels of three, bear little resemblance to the unitary courts that once answered to the names of the Ninth or the Sixth Circuits. Yet there is comfort to be found within a familiar structure. The circuits have so far done extremely well in meeting the growing caseload; and they have

all coped with the increase in judges. It may be that, as the Ninth Circuit has found, there are a variety of viable ways to make "jumboism" work.

We have no doubt that the larger circuits will have to adopt a small en banc, as has the Ninth.

They may also wish to create divisions, and experiment with the concept, not adopted by the Ninth, of having judges rotate within a particular division. They may also wish to consider developing a system for regularly assigned staff to notify judges of perceived intra-circuit conflicts. These and other innovations may eventually make it possible for the present circuits to adapt to the large caseload and numbers of judges. See Chief Judge Donald P. Lay, "The Federal Appeals Process: Whither We Goest? The Next Fifty Years", \_\_\_\_\_ (1988).

## CONCLUSION

Within probably five years it should be decided whether to keep the present circuits or whether to create some new structure. During the five year period, the circuits can continue effectively and should not hesitate to seek such additional judgeships as are needed. Also during this period, we hope that a study and pilot project, as proposed in the next section of this report, will be undertaken. This study and pilot project will lead to a greater understanding of the nature and extent of the intercourt conflicts problem, and of mechanisms, supplementing Supreme Court review, to resolve conflicts. Armed with the knowledge, and with further experience with larger circuits, a choice can then be better made whether to keep the present structure, or create some other.

## C. THE RISE IN INTERCIRCUIT CONFLICTS

In the previous section, we discussed one of the distortions that caseload increase causes in the circuit system established under the Evarts Act: namely, the increase in the number of judges beyond nine or ten a circuit. Since a court beyond like the traditional unitary appellate court, some observers feel the Evarts Act system is now "outgrown," that a new "structure" is needed. Like a lobster whose shell has been outgrown, the courts are said to need a new skeleton. As we have seen, however, there are relatively few new skeletons to choose from, and each has its own problems which must be weighed against the problems that exist if we try to make do with the present system.

If, for example, we were to restructure the present circuits to a maximum of nine judges in each, the resulting proliferation of circuits would exacerbate the problem to be addressed in this section, namely, the increasing inability of the Supreme Court, in the face of the growth in appeals, to resolve conflicts among the circuits.

In the first half of the 1900's the Supreme Court could easily manage its role of fashioning a single national law for the entire nation. In the early quarter of this century, about six percent of all federal appeals eventually reached it. As recently as 1950, the Court reviewed close to three per cent of federal appeals. That proportion has by now dropped to less than .4 percent, and will keep diminishing as the total number of appeals rise. The Supreme Court's annual caseload is in the neighborhood of 150 cases. This has remained roughly constant for sometime, and there is little prospect of a major change upwards. While a few commentators have suggested the Supreme Court could increase its own output if it wanted, we doubt that this



is so, given the difficulty of the cases that the Court hears. It is hard to imagine the Court splitting into three-judge panels, as some have urged, given the sensitivity of so many of its cases; and even if it did split into smaller panels, the increased opinion-writing burden this would place on the justices would quickly limit the gain in productivity. In any case, the Court alone can best gauge its capacity; and this, as said, has been approximately 150 cases for some years, of which approximately \_\_\_\_\_ percent come from the federal courts of appeals.

The relative capacity of the Supreme Court vis-a-vis the circuits is highly important because, under the system devised by the Evarts Act, the Supreme Court is our only national court of general jurisdiction. Sitting at the apex of the federal and state systems, one of its functions is to harmonize the federal law coming from both types of courts, including from the regional circuits.<sup>6</sup> Yet it is obvious that a court which hears less than .5 percent of all federal appeals is less able today to perform this harmonizing function than it once was when it heard three percent or more.

The Supreme Court has long since given up granting certiorari in all cases of intercourt conflicts. As a result there are many instances where a Congressional statute means one thing in one area of the country and something different elsewhere.

The relative importance of unresolved intercourt conflicts is a question that has been debated up to this moment. The Hruska Commission, in 1975, urged the creation of a new National Court of Appeals, intermediate between the Supreme Court and the circuits, in part because of the perceived need for greater capacity to resolve intercourt conflicts. Under the Hruska Commission's plan, the Supreme Court would refer 150 cases a year "down" to the new tribunal, thus doubling the capacity at the top of the system to determine federal law on a nationwide basis.

The recommended new court was never adopted by Congress, and subsequent proposals for a similar body, including one manned by existing circuit judges, have been unsuccessful. Meanwhile, one of the reasons for such a tribunal, the need to relieve the burden upon the justices of the Supreme Court, has largely disappeared now that the Court has discretionary control over its own docket. Intercourt conflicts remain an issue, however.

The difficulty in assessing the extent and seriousness of intercourt conflicts stems from the absence of comprehensive data. Some very valuable work has been done, but to make a full study (which we believe must be done) requires resources beyond those of an individual scholar. The Subcommittee has a paper by Jeffrey Barr that synthesizes the literature and research to date. Extrapolating from findings by several researchers, he estimates, very roughly, that there were 60 to 80 unresolved intercourt conflicts, of the sort that commentators deemed "direct," presented to the Supreme Court by petitions for certiorari in 1988 and refused review by the Court. This number omits less direct conflicts or "sideswipes" (e.g. a fundamentally inconsistent approach to an issue by circuits).

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<sup>6</sup>As Professor Meador writes,

"... [T]he Supreme Court remains the only institutional means through which this vastly increased outpouring of decisions can be harmonized and made uniform throughout the nation." 56 U. of Chi. L. Rev. 604 (1989).

Barr goes on to emphasize, however, that the bare numbers tell only a part of the story. He makes the point, that, "One can only gauge the need for federal court restructuring to deal with this problem by scrutinizing the conflicts and deciding which are important or 'intolerable' and which are not." Drawing upon work done by others, Barr identifies several factors as relevant to determining which conflicts are "intolerable" and which are not. Among these are the following:

(1) Whether a split in the law creates economic costs or other harm to multi-circuit actors, such as firms engaged in interstate commerce. Some congressional enactments, more than others, demand a uniform national interpretation. For example, Michael Sturley, in an article in 67 Texas L. Rev. 1251 (1989), analyzed the effect of conflicts in the interpretation of the Carriage of Goods by Sea Act ("COGSA"), under which national uniformity is essential so that commercial maritime shippers will know who must insure against which risks and at what costs. Professor Sturley found that the Supreme Court had been more willing to resolve conflicts under the Longshoremen and Harbor Worker's Compensation Act ("LHWCA") a statute as to which Congress did not regard national uniformity as so important than under COGSA, where conflicts are so harmful that any resolution (even the wrong one) may be better than none. Significantly, two organizations that have urged the Federal Courts Study Committee to address the problem of intercircuit conflicts represent firms engaged in interstate business activities. The Maritime Law Association has identified eight intercircuit conflicts which, until resolved, will adversely affect the clients of its members, who engage in maritime commerce. The International Association of Defense Counsel, representing Members of the (civil) defense bar, complain that "intercircuit court rivalry is [a problem] which touches all of us representing clients who engage in business in many states." An interstate business regulated under federal law is likely to be adversely affected by non-uniform construction of the law. In many instances, the particular law may not be important enough to interest the Supreme Court; yet the economic effects of leaving the conflicts unresolved may be quite harmful. Problems of this nature are not always evident to a judge or to a trial lawyer. The adverse consequences are felt in the planning and execution of business transactions, or in their avoidance.

(2) The need to prevent forum shopping. Conflicts may encourage forum shopping, especially since venue is frequently available to litigants around the nation.

(3) Fairness to litigants in different circuits. Certain laws may seem especially unfair if interpreted differently in different circuits, resulting in benefits to persons in one circuit that are denied in another.

(4) The need to avoid problems of non-acquiescence by federal administrative agencies. When circuits conflict in administrative agency cases, the agency is forced to choose between the uniform administration of its statutory scheme and obedience to the different dicta of the two courts in different regions. While the Solicitor General is usually able to obtain review of a particularly serious issue of this type, it may sometimes be more politic for him to let an agency live with and "work around" smaller issues of this nature. Even if the agency can do this, it may be costly for it to do so and may lead the agency, in some situations, to disregard the dictas of a federal court in similar cases, an approach which breeds disrespect for the law. The General Counsel of the Department of Health and Human Services has written us to list a number of conflicts in the interpretation of Social Security law in the circuits. Some involve sums so small "as to be unrealistic vehicles for seeking a writ of certiorari."



We list the above factors because we agree with Barr that some conflicts are more in need of rapid resolution than others. In theory, of course, all federal law should be uniform. But the Balkanization of the federal law in circumstances such as those described above is particularly harmful. By the same token, there are doubtless many procedural rules, and laws affecting actors in only one circuit at a time, where the effect of a conflict among the circuits is negligible. We realize that some commentators are of the view that, while harmful conflicts can and do exist, they are not so frequent that the Supreme Court cannot handle them. Barr's study suggests, to the contrary, that the problem is a larger one. Certainly the numbers he suggests, 60 to 80 unresolved direct conflicts in 1988, gives pause. We are also concerned by the complaints of the Maritime Law Association, which identifies eight unresolved conflicts of concern to its members, and of the Defense Lawyers Association. Finally, the sheer contrast between today's mounting numbers of appeals and the size of the Supreme Court's tiny, stable docket, suggests that all conflicts of any significance cannot reach the Supreme Court. It may be that conflicts in high profile areas reach the Court, but surely our legal institutions should be able, within a reasonable time, to provide a single, nationwide rule of interpretation for any federal statute where national uniformity is desirable.

The question now is what to do about the problem. It should not simply be ignored and left to fester. At the very least, there should be a study of the number and frequency of unresolved conflicts, coupled with an analysis of how many of them are truly "intolerable." We need especially to know how many "intolerable" conflicts our system is generating which, being in specialized or other "low profile" areas, are unlikely to be resolved by the Supreme Court.

While a study is needed, a study by itself is unlikely to do more than generate further debate and to postpone any solution. We, therefore, propose that a study be accompanied by pilot projects. By putting mechanisms in place designed to resolve real conflicts, we can expect to develop a practical understanding of the problem and of likely solutions. In designing such a pilot project, we have deliberately sought the simplest mechanisms. We have avoided recommending any new structure reminiscent of the controversial new court recommended by the Hruska Commission. Conceivably the time will come when major restructuring is desired; but we agree with those who say that the dimensions of the conflicts problem need first to be better understood. Moreover, it may be possible to utilize existing mechanisms to resolve conflicts.

We recommend the two following experimental pilot projects, to be authorized by Congress for a four year period:

1. Pursuant to Congressional authorization, the Supreme Court may refer down to an en banc circuit court a case presented to it by certiorari petition for final disposition of national precedent on the conflict issue only. The referral would be on some type of random basis which would preclude the Supreme Court from knowing the recipient of the case before the referral decision was made. The same circuits involved in the conflicts would not receive the case. The decision of the en banc circuit court would be a national precedent deciding the conflict question and would bind all federal courts except the Supreme Court. Authorization to "refer

down" such cases would be limited to twenty cases a year or similar small number, to avoid undue one burdens upon the circuit courts. Referral would be to a small en banc in any circuit where a small en banc is authorized.<sup>7</sup>

2. Simultaneously with the above, Congress would enact legislation providing,

(a) In deciding federal statutory question already decided by another circuit, a court of appeals will follow the previous circuit unless it is convinced that its decision was plainly wrong.

(b) The en banc court of a circuit must grant review of any panel decision of the circuit that (i) conflicts with that of another circuit, and (ii) involves a federal law that a majority of the active judges of the circuit think needs to receive a uniform interpretation nationally. Thereafter, the final decision of the en banc panel on the statutory issue in conflict shall be binding upon all other circuits provided the en banc panel certifies that, in its opinion, uniformity of interpretation is desirable and serves an important national interest.<sup>8</sup>

The two above pilot projects, lasting for four years, would be monitored by a committee chaired by the Chief Justice of the United States or other justice of the Supreme Court designated by him; two justices of the Supreme Court appointed by the Chief Justice; and two judges of the courts of appeals appointed by the Chief Justice. The Federal Judicial Center, under the supervision of that Committee, will during this period keep close numerical count of all federal conflicts and will analyze them, and report the results of its analysis, in terms of their relative seriousness, and the need for their resolution. The Center will also advise and assist the Committee in analyzing the results and relative success of the above pilot projects. Shortly before termination of the four-year period, the Committee will report to Congress its views as to the success or failure of the pilot projects, and will recommend that they be continued, stopped, modified, or replaced, or that other action be taken by Congress and the courts.

We believe that a pilot study as above described would constitute an enormous advance on any other approach. If a study of conflicts were alone held, the results might be no more than to add additional data to the pile of scholarly debate materials.

By having justices and judges wrestle with the real-life problem, the realities would quickly emerge and shape the solutions. The Supreme Court and others would soon discover to what extent and in what numbers there were "intolerable" conflicts of an "intermediate" sort i.e. suitable for court of appeals panel resolution but not of such importance as would normally

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<sup>7</sup> This mechanism was suggested by Judge J. Clifford Wallace in 1983. See Cal. L. Rev. 913, 935. Other similar "referral down" suggestions by Judge Wallace, *Id.* at 936, and by our colleague Justice Callow (see Appendix), would equally serve. We adopt the recommended proposal because it relies entirely on existing court resources without necessitating any structure that might renew the heated debate regarding the Hruska proposal and its offshoots.

<sup>8</sup> Central features of this proposal appear in an article by Justice Walter Shaeffer at 69 ABA Journal 452 (198-).

have induced Supreme Court review. Since it is the Supreme Court's responsibility to harmonize national law, this is an entirely appropriate project to concern it.

In addition to engaging the Supreme Court's interest and guidance, the second pilot project would tell whether it is feasible to "cut off conflicts at the pass" by utilizing circuit en banc panels to take charge of conflicts -- but only where national uniformity is needed. Thus a circuit en banc panel could establish national precedent in a case where a conflict has developed and where the panel certifies that national uniformity requires such action. By requiring this certification, undue rigidity would be prevented, yet, where necessary, a uniform, national law could be made without Supreme Court intervention.

These two pilot projects, and the accompanying study the Federal Judicial Center, would very quickly reveal the extent of the intercircuit conflict problem; it would also indicate which of two possible solutions -- decision by en banc circuit panels after reference down by the Supreme Court, or rules allowing the regional circuits, in some situations, to act nationally -- will work. We urge that the package we propose -- the pilot projects and accompanying study - be authorized by Congress.

**A Background Paper on  
the Circuit Boundaries of the  
United States Courts of Appeals**

**Prepared for the Subcommittee  
on Structure of the Federal  
Courts Study Committee**

**by**

**Thomas E. Baker  
Associate Reporter to the Subcommittee  
Professor  
Texas Tech University  
School of Law  
Lubbock, Texas 79409  
(806) 742-3992**



### Summary and Additional Sources

This Background Paper considers the circuit boundaries of the United States Courts of Appeals. It begins with a brief history. The intracircuit problems of the large circuit, sized by number of judges and docket, are briefly summarized and the remedy of circuit splitting is analyzed in the context of S. 948, the pending proposal to divide the Ninth Circuit. The Paper also discusses proposals for consolidation to deal with the intercircuit problems of the current nationwide system of twelve regional courts.

The conclusion reached here is that subdividing existing circuits, particularly the Ninth Circuit, would not be an effective reform. If circuit boundaries are to be reconsidered, then the preferred legislative attitude should be to consolidate the twelve regional circuits into fewer circuits, perhaps even a single and unified court of appeals.

The most relevant general commentaries on redrawing circuit boundaries are cited in the notes; copies are available from the author. Additional source materials and other points of view might be obtained directly from: (1) the Senate sponsors of S. 948, Senators Gorton, Hatfield, Packwood, McClure, Murkowski, and Stevens; (2) Chief Judge Alfred T. Goodwin, United States Court of Appeals for the Ninth Circuit, (818) 405-7100; and (3) Professor Arthur Hellman of the University of Pittsburgh Law School, (412) 648-1340.

Of course, the author of this Background Paper would be pleased to respond to questions or comments. The views expressed here are those of the author alone.

## I. Introduction

S. 948, now pending before the Senate Judiciary Committee, would divide the United States Court of Appeals for the Ninth Circuit into two circuits: a new ninth circuit composed of Arizona, California, and Nevada, and a new twelfth circuit composed of Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands.<sup>1</sup> This is a bad idea. My opinion is not meant to suggest that there is anything wrong per se with redrawing circuit boundaries. Even a brief historical account demonstrates that Congress has redrawn circuit boundaries quite regularly. Indeed, my own inclination is that Congress ought to redraw the circuit boundaries most dramatically. However, splitting the Court of Appeals for the Ninth Circuit into two new courts is a bad idea because, first, it will do nothing to help the problems of that particular court, and, second, the problems of the courts of appeals generally could be helped by just the opposite approach of consolidation. The preferable Congressional attitude would be to consolidate the twelve regional circuits into fewer circuits, perhaps, even to establish one single and unified court of appeals for the nation.

## II. A Brief History

The existing circuit boundary lines--depicted on that map of the United States for lawyers in the front of Federal Reporter, Second Series and the

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<sup>1</sup>S. 948, 101st Cong., 1st Sess. (1989).

Federal Supplement--are the arbitrary product of history.<sup>2</sup> The APPENDIX of this paper depicts the occasions when Congress has seen fit to redraw those imaginary lines. And the point that this geography for lawyers is imaginary, the fiction of a statute, should not be overlooked. These lines do not exist any more than does the dotted line you drive across going from California to Nevada, and I mean to explain that circuit lines have a good deal less legitimacy--even conceptually.

Congress first drew circuit boundaries in Section 4 of the Judiciary Act of 1789, which created the original intermediate tier of federal courts--three named circuits ("Eastern," "Middle," and "Southern") geographically encompassing the original thirteen district courts.<sup>3</sup> The district courts were exclusively trial courts of limited jurisdiction. The circuit courts were the principal trial courts, with original jurisdiction over more serious criminal controversies, diversity suits above a set figure, and civil cases in which the United States was a party. The three circuit courts had some appellate jurisdiction to review specified categories of district court decisions, but the Supreme Court was the primary appellate court. The circuit courts had no judges of their own; instead, two Supreme Court justices "rode circuit" to sit with one district judge as a panel.

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<sup>2</sup>See generally Baker, Precedent Times Three: Stare Decisis in the Divided Fifth Circuit, 35 Sw. L. J. 687, 688-99 (1981).

<sup>3</sup>Act of September 24, 1789, ch. 20, § 4, 1 Stat. 73, 74. See generally D. HENDERSON, COURTS FOR A NEW NATION (1971).

This enhanced the federalizing influence of the third branch and was designed to assure uniformity in the national law.<sup>4</sup> In order to lessen the travel burden on the justices, Congress soon reconstituted the circuit courts to require a panel of one justice and one district judge.<sup>5</sup> Three named circuits became numbered circuits with the passage of the short-lived "Law of the Midnight Judges" Act of 1801.<sup>6</sup> The 1801 statute created circuit judgeships enough to reconstitute the circuit courts as one three-judge panel in each of the six redrawn and numbered circuits. The repealing statute the next year undid this, but did preserve the numbered circuits, reassigned some states, and further reduced the circuit court quorum to one district judge sitting alone.<sup>7</sup>

The technical duty of Supreme Court justices riding circuit obliged Congress to add to the membership of the Supreme Court and to create new circuits in order to accomodate western expansion. A seventh circuit was added for Kentucky, Ohio and Tennessee in 1807.<sup>8</sup> Reluctant to increase the size of the Supreme Court, however, Congress went on for a generation without bringing new states into the circuits.

In 1837, Congress acceded to the built-up judicial needs by increasing the number of justices to nine and by redividing the country into nine

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<sup>4</sup>See J. GOBEL, 1 HISTORY OF THE SUPREME COURT--ANTECEDENTS AND BEGINNINGS TO 1801 457-508, 552-661 (1971).

<sup>5</sup>Act of March 2, 1793, ch. 22, 1 Stat. 333.

<sup>6</sup>Act of February 13, 1801, ch. 4, 2 Stat. 89. See generally Turner, The Midnight Judges, 109 U. PA. L. Rev. 494 (1961).

<sup>7</sup>Act of April 29, 1802, ch. 31, 2 Stat. 156, as amended by, Act of March 3, 1803, ch. 40, 2 Stat. 244.

<sup>8</sup>Act of February 24, 1807, ch. 16, 2 Stat. 420, as amended by, Act of March 22, 1808, ch. 38, 2 Stat. 477, and Act of February 4, 1809, ch. 14, 2 Stat. 516.



circuits.<sup>9</sup> Again, some states were reassigned from one circuit to another. California was added in 1855.<sup>10</sup> In 1862, the states that had been admitted to the Union since the major rearrangement in 1837 were assigned to circuits by enlarging the existing circuits and a tenth circuit and a tenth justice were added in 1863.<sup>11</sup> Back then Congress was quite willing to redraw circuit boundaries to shift a state from one circuit to another, as for example Indiana was moved from the seventh circuit to the eighth circuit.<sup>12</sup>

Again in 1866, Congress rearranged the circuits, shuffling states to draw nine circuits.<sup>13</sup> That statute created a judgeship for each circuit and further reduced Supreme Court justice circuit riding to a symbolic minimum.

The period between 1870 and 1891 has been labelled quite aptly as "the nadir of federal judicial administration."<sup>14</sup> Federal dockets grew dramatically, as a result of geographical expansion, population growth, commercial development, and congressional extensions of jurisdiction. The federal courts were hard-pressed to keep up. When reformers could not agree on what to do, nothing was done and matters worsened: "[t]he federal judicial system, ill-equipped to handle the pre-Civil War demands on its resources, nearly ground

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<sup>9</sup>Act of March 3, 1837, ch. 34, 5 Stat. 176.

<sup>10</sup>Act of March 2, 1855, ch. 142, 10 Stat. 631.

<sup>11</sup>Act of July 15, 1862, ch. 178, 12 Stat. 576; Act of March 3, 1863, ch. 100, 12 Stat. 794, as amended by, Act of February 19, 1864, ch. 11, 13 Stat. 4.

<sup>12</sup>Act of January 28, 1863, ch. 13, 12 Stat. 637.

<sup>13</sup>Act of July 23, 1866, ch. 210, 14 Stat. 209.

<sup>14</sup>P. BATOR, D. MELTZER, P. MISHKIN, & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 37 (3d ed. 1988).

to a halt during this post-war period, buried in work."<sup>15</sup> The country's westward vastness in area had made circuit riding wholly unfeasible. A complement of ten circuit judges, one in each numbered circuit, could not realistically supervise the sixty-five district courts. An appeal from a district court to a circuit court "panel" of one district judge was viewed realistically as a waste of time. The number of cases exceeded the system's capacity for appellate review.<sup>16</sup>

With the Circuit Court of Appeals Act of 1891, popularly known as the Evarts Act, Congress made the most significant structural change since the creation of the federal courts.<sup>17</sup> The statute created a new court--the circuit court of appeals--for each of the nine circuits comprised of two circuit judges (a second judgeship was added in each circuit) and either one circuit justice or one district judge. The original circuit court continued as a trial court but its whole appellate jurisdiction was transferred to the new circuit court of appeals. A second appeal as of right to the Supreme Court from the circuit court of appeals was limited by subject matter and jurisdictional amount. In the remaining cases, the circuit court of appeals was reviewed only with discretionary leave of the Supreme Court. The anachronistic circuit courts were finally abolished and their remnant original jurisdiction was transferred to the district courts in 1911.<sup>18</sup> The modern structure became complete in 1925 when

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<sup>15</sup>Baker, supra note 2, at 692.

<sup>16</sup>See Carrington, The Function of the Civil Appeal: A Late-Century View, 38 S.CAR. L. REV. 411, 413-16 (1987).

<sup>17</sup>Act of March 3, 1891, ch. 517, 26 Stat. 826. See generally F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM 103-28 (1928).

<sup>18</sup>Act of March 11, 1911, Pub. L. No. 61-745, 36 Stat. 1087.

Congress dramatically expanded the Supreme Court's discretion over its docket.<sup>19</sup> This design contemplates the district court for trial to resolve disputes, the court of appeals for the appeal as of right to correct error, and the Supreme Court for the discretionary final review to establish a uniform national law.

Even after the structure and functions of the modern federal courts stabilized, Congress continued to redraw circuit boundaries. In 1929, the Court of Appeals for the Tenth Circuit was added to the nine circuits created by the Evarts Act by detaching six states from the Eighth Circuit.<sup>20</sup> Both circuits have remained geographically constant since. In 1948, Congress formally added the District of Columbia Circuit.<sup>21</sup> The Judicial Code of that same year renamed the circuit courts of appeals to be known as the "United States Court of Appeals for the (numbered/named) Circuit."<sup>22</sup> The Court of Appeals for the Eleventh Circuit was created in 1981 by cleaving Alabama, Florida, and Georgia from the former Fifth Circuit to leave Louisiana, Mississippi, and Texas in the new Fifth Circuit.<sup>23</sup> And the next year Congress added a new circuit to the list, the Federal Circuit, which represents a notable experiment with a national boundary

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<sup>19</sup> Act of February 13, 1925, Pub. L. No. 68-415, 43 Stat. 936. See also Pub. L. No. 100-352, 102 Stat. 662 (Supreme Court Case Selection Act of 1988).

<sup>20</sup> Act of February 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346.

<sup>21</sup> Act of June 25, 1948, Pub. L. No. 80-773, § 41, 62 Stat. 869, 870, codifying Swift & Co. v. United States, 276 U.S. 311 (1928).

<sup>22</sup> Act of June 25, 1948, Pub. L. No. 80-773, § 2680, 62 Stat. 869, 985. See C. WRIGHT, THE LAW OF FEDERAL COURTS § 3 at 10 (4th ed. 1983).

<sup>23</sup> Act of October 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994.

and subject matter jurisdiction.<sup>24</sup>

Thus, Congress has demonstrated a ready willingness to redraw circuit boundaries and to reassign states to existing or newly created circuits. Viewed historically then these boundary lines, far from being chiseled in stone, appear to be quite evanescent. Viewed functionally then these incidents of redrawing may be recognized as a frequently exercised incidental of the near-plenary Congressional power to "from time to time ordain and establish" the "inferior courts" of the United States.<sup>25</sup>

### III. Dividing Courts of Appeals

During the modern period, Congress twice has divided existing circuits into two new circuits: in 1929 to separate a new Tenth Circuit from the Eighth Circuit and in 1981 to separate the new Eleventh Circuit from the Fifth Circuit. Understanding the attendant circumstances at these divisions and the new courts' experiences since helps to inform the contemporary debate over whether to separate a proposed new twelfth circuit from the Ninth Circuit.

In 1925, efforts to alleviate the congestion in the circuit dockets

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<sup>24</sup>Act of April 2, 1982, Pub. L. No. 97-164, 96 Stat. 25. See generally Posner, Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function, 56 S. CAL. L. REV. 761 (1983); Dreyfuss, The Federal Circuit: a Case Study in Specialized Courts, 64 N.Y.U. L. REV. 1 (1989); Note, An Appraisal of the Court of Appeals for the Federal Circuit, 57 S. CAL. L. REV. 301 (1984).

<sup>25</sup>U.S. Const. Art. III § 1 ("inferior" is the term in Article III). See E. CHEMERINSKY, FEDERAL JURISDICTION § 1.1 at 3 (1989).



centered on the Eighth Circuit.<sup>26</sup> That court then covered thirteen states from Minnesota in the north to New Mexico in the south and from Iowa in the east to Utah in the west. In 1927, an ABA committee, without the endorsement of the ABA, proposed to redraw all the existing circuit boundaries and in the process create a new tenth circuit to include Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, and Washington.<sup>27</sup> The opposition to the proposal proved diverse and effective. Opponents complained chiefly about switching states from one circuit to another and the consequent changes in the law, although buttressing arguments were heard that the workload in the Eighth Circuit did not justify a division, that the bill would not adequately address the docket problem because it failed to create new judgeships, and that the one-to-one ratio of circuits to justices on the Supreme Court should not be abandoned. After that, Chief Justice Taft, exercising characteristic leadership, suggested that Congress could divide the Eighth Circuit and let alone all the others.<sup>28</sup> Members of the Bar and the judges on the Eighth Circuit supported this proposal and, after debating various bills to divide the court in different ways, Congress passed a statute in 1929 dividing the court and creating two new judgeships.<sup>29</sup>

Since then, the Eighth Circuit has included Arkansas, Iowa, Minnesota,

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<sup>26</sup>See generally Stanley & Russell, The Political and Administrative History of the United States Court of Appeals for the Tenth Circuit, 66 DENVER L. J. 119, 124-28 (1983).

<sup>27</sup>Id. citing D. BONN, THE GEOGRAPHICAL DIVISION OF THE EIGHTH CIRCUIT COURT OF APPEALS 4 (Sept. 1974) (research report written for the Federal Judicial Center).

<sup>28</sup>Hearings on H.R. 5690, H.R. 13567, and H.R. 13757 Before the House Comm. on the Judiciary, 70th Cong., 1st & 2d Sess. at 67 (Testimony of Chief Justice Taft).

<sup>29</sup>Act of Feb. 28, 1929, Pub. L. No. 840, 45 Stat. 1347.

North Dakota, and South Dakota, and the Tenth Circuit has included Colorado, \_\_\_\_\_, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.<sup>30</sup> In the years since, active judgeships have increased in the Eighth Circuit from five to ten and in the Tenth Circuit from four to ten. The dockets of the courts of appeals in 1929, the year of the division, have so little in common with contemporary dockets in size or in scope, however, that a comparison would not be helpful. These two courts of appeals are typical today in that increased staff and procedural innovations continue to keep them afloat.<sup>31</sup> What is interesting is the noted reluctance to redraw all the circuit boundaries and the congressional strategy to focus, instead, on dividing one large circuit. The same strategy was espoused again in 1973 by the congressionally-created Commission on Revision of the Federal Court Appellate System, the so-called "Hruska Commission":

We have not recommended a general realignment of all the circuits. To be sure, the present boundaries are largely the result of historical accident and do not satisfy such criteria as parity of caseloads and geographical compactness. But these boundaries have stood since the nineteenth century, except for the creation of the Tenth Circuit in 1929, and whatever the actual extent of variation in the law from circuit to circuit, relocation would take from the bench and bar at least some of the law now familiar to them. Moreover, the Commission has heard eloquent testimony evidencing the sense of community shared by lawyers and judges within the present circuits. Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents.<sup>32</sup>

That comprehensive Study recommended, instead, to divide the two largest courts

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<sup>30</sup>The Tenth Circuit is a candidate to be a question of "federal jurisdiction trivial pursuit." Because the District of Wyoming includes all of that state and such portions of Yellowstone National Park as are within Montana and Idaho, the Tenth Circuit contains areas outside the six listed states. 28 U.S.C. § 131 (1982). See C. WRIGHT, *supra* note 22, § 2 at 8-n. 3.

<sup>31</sup>See generally Baker, A Compendium of Proposals to Reform the United States Courts of Appeals, 37 U. FLA. L. REV. 225, 273-74 (1985).

<sup>32</sup>Commission on Revision of the Federal Court Appellate System, The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change, 62 F.R.D. 223, 228 (1973).

of appeals--the Fifth Circuit, which has happened, and the Ninth Circuit, which is being considered anew.

Nearer in time and more similar in complexity, the division of the Fifth Circuit is the most significant legislative precedent for the current debate over dividing the Ninth Circuit. You could write a book about the story of the division of the Fifth Circuit, but it would be preempted.<sup>33</sup> The docket problems of the Fifth Circuit first became a concern two decades before Congress moved to divide.<sup>34</sup> In 1964, an ad hoc committee of the Judicial Conference of the United States recommended a division of the Fifth Circuit into a new fifth circuit composed of Alabama, Florida, Georgia, and Mississippi, and a new eleventh circuit composed of Louisiana, Texas, and the Canal Zone.<sup>35</sup> Congress added four temporary judges to the Fifth Circuit in 1966, and in 1968 made those judgeships permanent and added two more, increasing the total to fifteen judges.<sup>36</sup> Between 1950 and the mid-1970s, the filings in the Fifth Circuit multiplied by a factor of eight<sup>37</sup> and "Congress simply could not add judges fast enough."<sup>38</sup> The Court survived by exceeding norms of productivity and by implementing intramural procedural reforms which cumulatively transformed the intermediate appellate

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<sup>33</sup>D. BARROW & T. WALKER, A COURT DIVIDED--THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM (1988). See also generally Baker, supra note 2, at 696-705.

<sup>34</sup>See Wahl, The Case for an Eleventh Court of Appeals, 24 Fla. L. J. 233 (1950); Wright, The Overloaded Fifth Circuit: A Crisis in Judicial Administration, 42 TEXAS L. REV. 949 (1964).

<sup>35</sup>1964 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14-15.

<sup>36</sup>Act of March 18, 1966, Pub. L. No. 89-372, 80 Stat. 75; Act of June 18, 1968, Pub. L. No. 90-347, 82 Stat. 184.

<sup>37</sup>Gee, The Imminent Destruction of the Fifth Circuit: Or, How Not to Deal with a Blossoming Docket, 9 TEX. TECH. L. REV. 799 (1978).

<sup>38</sup>Baker, supra note 2, at 697.

court.<sup>39</sup>

Responding to the urgings of Chief Justice Burger and others, Congress created the Commission on Revision of the Federal Court Appellate System.<sup>40</sup> After extensive hearings, the Hruska Commission recommended in 1973 that Congress divide the Fifth Circuit and the Ninth Circuit. The states of the Fifth Circuit were to be grouped in two new circuits: Alabama, Florida and Georgia in one circuit, and Mississippi, Louisiana, and Texas in another circuit. The Commission also proposed two alternative realignments: (A) grouping Alabama, Florida, Georgia, and Mississippi in one circuit and grouping Arkansas (from the Eighth Circuit), Louisiana, and Texas in another circuit; or (B) grouping Alabama, Florida, Georgia, and Mississippi in one circuit and grouping Louisiana and Texas in another circuit. This recommendation and these two alternatives satisfied the criteria the Commission established: (1) circuits would be composed of at least three states; (2) no circuit should be created that would immediately require more than nine judges; (3) a circuit should contain states with a diversity of legal business, socioeconomic interests and population; (4) realignment should avoid excessive interference with established circuit boundaries; and (5) no circuit should contain noncontiguous states.<sup>41</sup> Bills were introduced tracking each of the three proposed divisions,<sup>42</sup> but a compromise measure, seemingly not satisfactory to anyone, emerged to reorganize the Fifth Circuit into two internal divisions,

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<sup>39</sup>See generally Baker, supra note 31, at 243-74.

<sup>40</sup>Act of October 13, 1972, Pub. L. No. 92-489, 86 Stat. 807.

<sup>41</sup>62 F.R.D. at 231-32.

<sup>42</sup>S. 2988-2990, 93rd Cong., 2d Sess. (1974). See generally [1978] U.S. CODE CONG. & AD. NEWS 3569, 3601-05.



each with its own chief judge, clerk, circuit executive and judicial council.<sup>43</sup> Objections to creating two new courts went from the ridiculous to the sublime: a concern over which new court would bear the name Fifth; resistance to grouping Mississippi with the civil law state of Louisiana and with Texas; a worry about creating an oil and gas circuit dominated by Louisiana and Texas; and reverence for the history and tradition of the Fifth Circuit. The matter stalled.

In 1978, Congress tried again. A bill passed the Senate that would have added judgeships and would have created two separate circuits: a new fifth circuit comprised of Alabama, Florida, Georgia, Mississippi, and the Canal Zone, and a new eleventh circuit comprised of Louisiana and Texas.<sup>44</sup> The House passed a bill that would have increased the number of judgeships, but would not divide the court.<sup>45</sup> The Conference Committee had a difficult time of it: the Senate's bill would have violated two criteria of the Hruska Commission to create a two-state circuit and to create two new courts each with more than nine judges. The civil rights industry opposed creating the proposed fifth circuit with as perceived more conservative, deep south judges, and the worry was raised again that the proposed eleventh circuit effectively would become an oil and gas subject matter court. With the important nationwide patronage of more than 150 new judgeships providing the will, Congress found the way to compromise in 1978. The Fifth Circuit was increased to twenty-six judges and the statute authorized any court of appeals with more than fifteen active judges (the Ninth Circuit was

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<sup>43</sup>S. Rep. No. 117, 95th Cong., 1st Sess., reprinted in, [1978] U.S. CODE CONG. & AD. NEWS 3569.

<sup>44</sup>S. 11, 95th Cong., 2d Sess. (1977).

<sup>45</sup>H. R. 7843, 95th Cong., 2d Sess. (1978).

the only other one) to constitute itself into administrative units and to adopt a rule to perform the en banc function with fewer than all its members.<sup>46</sup> Congress had added judges and had left the problem with them.<sup>47</sup>

The Fifth Circuit Judicial Council followed the Congressional lead and appointed a committee to study the feasibility of an internal reorganization into administrative units and to propose an en banc procedure. After much debate and deliberation, in May 1980, the Fifth Circuit Judicial Council arranged the Court into two administrative units: Unit A, composed of Louisiana, Mississippi, and Texas, and Unit B, composed of Alabama, Florida, and Georgia. The unities of the en banc court, the judicial council, and the judicial council were maintained. But significantly, the Judicial Council for the first time unanimously petitioned Congress to divide the Court into two autonomous circuits.<sup>48</sup> Congress found this unanimity compelling and, when numerous bar associations and other organizations supported the measure and when civil rights groups withdrew their opposition, the former Fifth Circuit was divided.<sup>49</sup> Congress divided the former Fifth Circuit because of its largeness--in geography, population, docket, and judgeships. Redrawing the

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<sup>46</sup> Act of October 20, 1978, Pub. L. No. 95-486, § 6 192 Stat. 1629, 1633 (codified at 28 U.S.C. § 46 (1982)). See also H. CONF. REP. NO. 1643, 95th Cong., 2d Sess., reprinted in, [1978] U.S. CODE CONG. & AD. NEWS 3618.

<sup>47</sup> See Gee, supra note 37; Morgan, The Fifth Circuit: Expand or Divide?, 29 MERCER L. REV. 885 (1978); Reavley, The Split of the Fifth Circuit: Update and Finis, 12 TEX. TECH L. REV. 1 (1981).

<sup>48</sup> See generally Reavley, supra note 47, at 5-7.

<sup>49</sup> Pub. L. No. 96-452, 94 Stat. 1994 (1980) (codified at 28 U.S.C. §§ 1, 41). See also H. R. REP. NO. 1390, 96th Cong., 2d Sess., reprinted in, [1980] U.S. CODE CONG. & AD. NEWS 4236; Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary on H. R. 6060, H. R. 7665, and Related Bills, 96th Cong., 2d Sess. (1980).

circuit boundaries, however, did absolutely nothing to relieve the press of the caseload. The new Fifth Circuit reached the pre-division crisis level of filings in less than five years.<sup>50</sup> Last May, Chief Judge Charles Clark of the Fifth Circuit chronicled the region's relentless docket growth:

Since this is a joint conference [of the Fifth and Eleventh Circuits], I thought it might be interesting to compare where the circuits began in 1981 and where they are now. In the district courts, pending civil cases in the 5th Circuit increased 60% since 1981. They presently total 36,871. In the 11th Circuit, the increase has been 48% and the present total is 19,530. Criminal cases in the district courts in the fifth Circuit have increased by an astounding 280% to the present total of 4,343. The 11th Circuit criminal case increase has been almost as dramatic: 188%. Pending criminal cases now total 3,539 pending cases. Pending bankruptcy cases in the 5th Circuit increased 108% to their present level of just over 100,000, while the 11th Circuit's pending bankruptcy cases increased 79% to the present-day total of 93,514. In the Courts of Appeals, pending cases in the Fifth rose by 35% to the present total of 2,955, while the 11th Circuit experienced a 44% increase in pending cases to a total of 3,171.<sup>51</sup>

The Eleventh Circuit Judicial Council has reached the point of passing a formal resolution this year asking Congress not to create anymore circuit judgeships, despite statistical-caseload justifications, because that court of appeals simply would be too large.<sup>52</sup>

#### IV. The Current Proposal to Divide the Ninth Circuit

In the meantime, the Ninth Circuit has followed through on the 1978 Congressional compromise.<sup>53</sup> Proposals to divide the Ninth Circuit had been

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<sup>50</sup>Speech by Gilbert Ganeuchau, Fifth Circuit Appellate Advocacy Seminar (Oct. 18, 1984), reprinted in, 2 Fifth Circuit Reporter 301 (1985).

<sup>51</sup>Remarks of Chief Judge Charles Clark, 1989 Judicial Conference of the Fifth and Eleventh Judicial Circuits (New Orleans, La., May 8, 1989).

<sup>52</sup>Remarks of Chief Judge Paul H. Roney, 1989 Judicial Conference of the Fifth and Eleventh Judicial Circuits (New Orleans, La., May 8, 1989).

<sup>53</sup>See generally Position Paper on S. 948, Ninth Circuit Court of Appeals Reorganization Act, prepared by the Office of the Circuit Executive, United States Courts for the Ninth Circuit (1989) [hereinafter Position Paper].

around since before World War II and it was no surprise in 1973 that the Hruska Commission would recommend that it be divided, along with the Fifth Circuit.<sup>54</sup> What was surprising was the Commission's proposal to carve up California and reassign district courts in the same state to different circuits.<sup>55</sup> That was enough to end the matter, although the idea has been persistent: the last bill to divide the Ninth Circuit went nowhere in 1983.<sup>56</sup> The Ninth Circuit has accepted the legislative challenge to administer a large circuit efficiently by innovation and industry. In 1978, Congress authorized:

Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.<sup>57</sup>

The Ninth Circuit reorganized itself internally into three administrative units to allow for a more decentralized and more efficient administration. The court adopted a rule to create a limited en banc court composed of the Chief Judge and ten circuit judges drawn by lot for each case.<sup>58</sup> The judges also increased their judicial output and have adopted a number of intramural reforms, including a submission-without-oral argument track for more straightforward appeals and a prebriefing conference program to narrow issues, shorten briefs, and encourage settlements. The experimental phase seems to be over.<sup>59</sup> In its first report to Congress in 1982 the Ninth Circuit described the planned changes. The second

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<sup>54</sup>62 F.R.D. at 234-42.

<sup>55</sup>See generally Hellman, Legal Problems of Dividing a State Between Federal Judicial Circuits, 122 U. Pa. L. REV. 1188 (1974). But cf. supra note 30.

<sup>56</sup>S. 1156, 98th Cong., 1st Sess. (1983).

<sup>57</sup>Act of October 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 supplemented by Act of October 15, 1980, Pub. L. No. 96-458, 94 Stat. 2035.

<sup>58</sup>Ninth Circuit Rule 35-3 (formerly Rule 25). See generally Bennett & Pembroke, "Mini" In Banc Proceedings: A Survey of Circuit Practices, 34 CLEV. ST. L. REV. 531 (1986).

<sup>59</sup>Position Paper, supra note 53, at 2.



report in 1984 noted progress and remaining difficulties. The third report in 1986 concluded "emphatically that a large circuit can perform well and that no further legislation [was] necessary to accomplish that result."<sup>60</sup> A Draft Fourth Biennial Report carefully documents the Ninth Circuit judges' firm conclusion that there is no need to divide their court.<sup>61</sup>

S. 948, currently before the Courts and Administrative Practice Subcommittee of the Senate Judiciary Committee, seems to have a good chance of overcoming that conclusion. Introduced by Senators from the Northwest, the redrawn boundaries would leave Arizona, California, and Nevada in a new ninth circuit, and would transfer Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands to a new twelfth circuit.<sup>62</sup> While the assertion by the Chief Judge Goodwin of the Ninth Circuit seems correct, that this proposal is "blatantly political,"<sup>63</sup> most all issues having to do with federal courts are political. Published news accounts suggest that this bill is the latest round in "a long running fight between the Northwest's pro-growth developers and the environmentalists. . . ."<sup>64</sup> Timed, as it is, when the

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<sup>60</sup>Id. See also generally Wasby, The Bar's Role in the Governance of the Ninth Circuit, 25 WILLAMETTE L. REV. 471 (1989).

<sup>61</sup>Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1978 and other Measures to Improve the Administration of Justice in the Ninth Circuit. (Preliminary draft--not for external publication 1989)

<sup>62</sup>S. 948, 101 Cong., 1st Sess. (1989) (sponsors include Senators Gorton (R-Wash.), Hatfield (D.-Ore.), Packwood (R.-Ore.), McClure (R.-Idaho), Murkowski (R.-Alaska), and Stevens (R.-Alaska). See generally Cong. Rec. S 5027 (May 5, 1989) (Statements on introduction).

<sup>63</sup>D. Trigoboff, Northwest Favors Splitting 'California' Circuit, LEGAL TIMES p. 2 (June 12, 1989) (quoting Chief Judge Alfred Goodwin).

<sup>64</sup>Id. The alleged political motive is to overcome the so-called California-judge dominance of the Ninth Circuit which lately has delivered too many "decisions--frequently reversals of district judges in Washington and Oregon--favoring such plaintiffs as Save the Yaak (a river in Montana) and Friends of the Earth. Often the defendants are governmental agencies cooperating with private concerns attempting to develop or draw resources from public lands." Id. at 2 & 15. See, e.g., Portland Audobon Society v. Hodel, 866 F.2d 302 (9th Cir. 1989).

congressionally created Federal Courts Study Committee is developing a long-range plan for meeting the needs of the nation's entire court system, S. 948 seems to be premature or perhaps is a thinly disguised effort to influence the Study Committee's work.<sup>65</sup> Giving the Senate sponsors the benefit of the doubt, the bill provides an occasion to bring up to date the debate whether to divide the Ninth Circuit.

One would suppose that those who would redraw circuit boundaries would bear the burden of persuasion, a burden which has gone unmet so far in the consideration of S. 948.<sup>66</sup> In a formal response summarized here, the Ninth Circuit's judicial defenders who oppose the bill have persuasively rebutted the allegations of the Senate sponsors.<sup>67</sup>

Senator Gorton deemed the size of the Ninth Circuit, like the size of the former Fifth Circuit, to be a problem in and of itself.<sup>68</sup> The Ninth Circuit currently has 28 judgeships, 12 more than the next largest circuit, and a caseload of more than 6,000 appeals, 2,000 more than the next largest court of appeals' docket. The nine states in the Ninth Circuit generate nearly one-sixth of the total appeals in the twelve regional courts of appeals. Projections promise an even more Brobdignagian docket as the current rate of growth would double the 1980 docket before the year 2000. In calendar year 1988, the Ninth Circuit terminated 6,170 appeals, 17.7% more than the previous year.<sup>69</sup> Despite three unfilled vacancies, the court's calendar remains current: once an appeal

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<sup>65</sup> Act of November 19, 1988, Pub. L. No. 100-702.

<sup>66</sup> See Statements on the Introduction of S. 948, 135 Cong. Rec. S5027-28 (May 9, 1989).

<sup>67</sup> Position Paper, supra note 53, at 3-7, 8-11. See also Frank, Split 9th Circuit?, 71 A.B.A.J. 30 (1985).

<sup>68</sup> 135 Cong. Rec. at S5026 (Statement of Sen. Gorton).

<sup>69</sup> Position Paper, supra note 53, at 7.

is fully briefed by counsel, it is scheduled for the next calendar. But filling those vacancies and dividing the circuit simply would not address the problem of workload; the same number of judges would face the same number of appeals, only in two circuits instead of one. In the abstract, size may be viewed as an asset. The bench is enriched by diversity among its judges. There is more flexibility in the court of appeals and in the district courts to shift judges around to meet episodic needs. One sponsor noted that 14.5 months was the median time the Ninth Circuit took to process an appeal.<sup>70</sup> Of that period, however, only a fraction is spent in judges' chambers, from submission to disposition: 2.5 months for orally argued cases and 0.9 months for submitted cases. These figures are less than the national average.<sup>71</sup> The remainder of

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<sup>70</sup>135 Cong. Rec. at S5027 (Statement of Sen. Burns).

<sup>71</sup>Position Paper, supra note 53, at 9-10.

An objective evaluator has concluded:

It is true that in recent years the Ninth Circuit has ranked low among the twelve regional circuits in the number of appeals terminated on the merits per three judge panel. The court has also had one of the poorest records for speed of case processing, if one measures the median time from filing notice of appeal to disposition. However, the court comes off quite favorably in the size of its backlog as measured by the number of appeals pending per panel. Similarly, if one looks at the median time for processing cases after the judges have begun work, the Ninth Circuit looks quite good. Perhaps the judges on other courts of appeals handle more cases individually because those courts do not have as many judgeships as their caseloads would warrant.

Even if one were to focus solely on the Ninth Circuit's modest showing in the statistical data on case participations per judge it would be impossible to identify a cause and effect relationship because so many other factors may also be at work (for example the Ninth Circuit's practice of writing self-contained memoranda in cases not decided by published opinion).

Hellman, Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court, 55 U. CHI. L. REV. \_\_\_\_\_, \_\_\_\_\_ n. 256 (1989) (forthcoming).

the 14.5 months is spent by court reporters and attorneys in record preparation and briefing.

Senator Gorton and Senator Hatfield expressed a serious concern for decreased consistency and the later gave as one main reason for division "the increased likelihood of intracircuit conflicts."<sup>72</sup> Defenders from the Ninth Circuit respond:

Preservation of a single circuit with a single court of appeals has resulted in the maintenance of a consistent and predictable body of federal law throughout the western states and the Pacific maritime area, facilitating trade and commerce and contributing to stability and orderly progress. If the admiralty and commercial law of the Pacific ports were to be divided between two separate and independent Courts of Appeals, conflicts would inevitably develop and predictability of the law would be diminished in this vitally important region.<sup>73</sup>

Consistent with the newspaper explanation of the politics of this current proposal, the sponsors impliedly would hope for conflicts between the two proposed circuits. Then the federal law in the Pacific Northwest would differ substantially from the federal law in Arizona, California and Nevada.<sup>74</sup> They are after a change in federal law, not consistency. Senator Hatfield made much to do about a survey of judges and attorneys conducted by the Ninth Circuit in which a majority of judges and lawyers disagreed with the statement "[t]here is consistency between panels considering the same issue."<sup>75</sup> Whatever else might

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<sup>72</sup>135 Cong. Rec. at S5026 (Statement of Sen. Gorton); Id. at S5027 (Statement of Sen. Hatfield).

<sup>73</sup>Position Paper, supra note 53, at 6.

<sup>74</sup>See 135 Cong. Rec. at S5026-28.

<sup>75</sup>Id. at S5027 (Statement of Sen. Hatfield). See generally Ninth Circuit Judicial Council, Survey of District Judges and Attorneys Regarding the U.S. Court of Appeals for the Ninth Circuit 19 (July 1987).



be said about the polling validity of this phrasing, a contrary impression appears from other questions in the same survey. A majority of both judges and lawyers agreed with statements that the "Ninth Circuit decisions generally adhere to law announced in earlier opinions" and that the "quality of published opinions is good."<sup>76</sup> Arguably, the Ninth Circuit has done more than other circuits to deal with intracircuit conflicts. All fully briefed cases are reviewed by central staff attorneys who code the issues on appeal into a computer.<sup>77</sup> Cases which raise the same issue and become ready for calendaring around the same time are assigned to the same three-judge panel. This computer program also informs later panels when an earlier panel has heard but not yet decided the same issue; the first panel that gets the issue then decides it authoritatively.<sup>78</sup> Even the judges who are not on the hearing panel write memoranda that not infrequently result in modification and clarification of a panel opinion. The limited en banc procedure already described decides conflicts that arise despite these procedures. A recent empirical study has concluded: "On the basis of an admittedly limited sample, it does not appear that intracircuit inconsistency is as much of a problem as many lawyers think."<sup>79</sup> One indication of the effectiveness of this scheme is the relatively small number of en banc rehearings which are granted each year.

Senator Gorton complained that the Northwest states "are simply dominated

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<sup>76</sup>Position Paper, supra note 53, at 8-9. A follow-up, more detailed, survey is underway currently to identify inconsistent lines of precedent and preliminary results suggest there are few particular examples. Id. at 9.

<sup>77</sup>Hellman, Central Staff in Appellate Courts: The Experience of the Ninth Circuit 68 CAL. L. REV. 937 (1980).

<sup>78</sup>United States Court of Appeals for the Ninth Circuit General Orders 4.1 (1987).

<sup>79</sup>Hellman, supra note 71, at \_\_\_\_\_. If there is a perception of inconsistency it may be best explained by the disarray in a few prominent areas of law, which are not characteristic of the general law of the Ninth Circuit. Id. at \_\_\_\_\_. See also generally Wasby, Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution, 32 VAND. L. REV. 1343 (1979).

by California judges and California-attitudes."<sup>80</sup> Senator Burns said that "it is [not] fair or in the best interest of the judicial process" for citizens of states such as Montana to suffer because California, like the population centers on both coasts, "continues to experience an economic and population boom."<sup>81</sup> While "California attitudes" may be a quite deserved epithet in the general life of the Nation, the sponsors' underlying premise that California judges are idiosyncratic and monolithic, a subset among Ninth Circuit judges, simply is beyond the threshold of absurdity. Anyone who studied the judicial philosophies on the Ninth Circuit and then took the time to understand the way hearing panels are constituted would know better.<sup>82</sup> Panels are drawn by computer from a pool that includes all the judges on the Ninth Circuit. The program is designed so that each judge sits with every other judge in the pool an equal number of times, and sits at each place for holding court an equal number of times. It is quite rare that all three judges from a panel are from the same place. Except for the Chief Judge, the en banc court is randomized in each case. To correlate decisions with the geographic origins of the judges would appear impossible even for our number-crunching colleagues in the social sciences. At least, no one has tried it.

Senator Packwood urged that dividing the Ninth Circuit "will allow judges and their clerks [sic] to develop an even greater mastery of the State laws which their circuit encompasses than the high level of expertise which

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<sup>80</sup> 135 Cong. Rec. at S5026 (Statement of Sen. Gorton).

<sup>81</sup> Id. at S5028 (Statement of Sen. Burns).

<sup>82</sup> See Position Paper, supra note 53, at 9. See also Hellman, supra note 71, at \_\_\_\_ n. 19.

they currently exhibit."<sup>83</sup> First, the current "high level of expertise" does not appear inadequate. Second, the statistics call the significance of this argument into question. The Ninth Circuit currently decides about 225 appeals in diversity cases each year and in three-fourths of those the district judge, who in the typical case was a practitioner in that state's law, is affirmed.<sup>84</sup> The remaining 5,800 plus cases raise issues of federal law.

Finally, Senator Packwood suggested that dividing the Ninth Circuit might reduce the reversal rate by the Supreme Court.<sup>85</sup> Admittedly, the statistics fluctuate from Term to Term, but as recently as October Term 1986 the Ninth Circuit ranked tenth among the twelve regional circuits in reversal rate with a 47% reversal rate compared to a national average of 62%.<sup>86</sup> In any event this argument seems something of a non sequiter.<sup>87</sup> It should be noted that dividing the Fifth Circuit did not appreciably affect the number of cases claiming Supreme Court review from the region of the new Fifth and Eleventh Circuits.

These arguments cumulatively and individually then appear to be craftsmanlike efforts by staffers to justify their principals' underlying political goal to shift the direction of law in the Ninth Circuit. Of course, there is nothing inherently wrong with that goal. Indeed, the desire on the part of those in the Pacific Northwest to have a circuit of their own,

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<sup>83</sup>135 Cong. Rec. at S5027 (Statement of Sen. Packwood).

<sup>84</sup>Position Paper, supra note 53, at 10. But cf. Matter of McLinn, 739 F.2d 1395 (9th Cir. en banc 1984) (questions of state law are reviewable under same independent de novo standard as are questions of federal law).

<sup>85</sup>135 Cong. Rec. at S5027 (Statement of Sen. Packwood).

<sup>86</sup>Position Paper, supra note 53, at 11.

<sup>87</sup>See Spaeth, Supreme Court Disposition of Federal Circuit Court Decisions, 68 JUDICATURE 245 (1985).

independent of the California presence goes back to the 1940s and likely will continue. The judges who resist the division are practicing "politics," as well.<sup>88</sup> Their apparent desires for size and stability likewise fuel this debate. The judges may just be more conservative, of institutions not necessarily ideologically; some may relish judicial administration on the grand scale; being a member of a court which is larger than the first Senate may be attractive to some judges; even sessions in Hawaii can be seen as a perquisite to be protected.<sup>89</sup> There is a certain irony in the overall Senatorial impatience exhibited by S. 984, however. The Ninth Circuit has a Republican majority now, which can be expected to be quite substantial by the end of the current Administration.<sup>90</sup> When this ineluctable constitutional mechanism of nomination and confirmation was disregarded during the ill-fated court-packing plan of 1937,<sup>91</sup> Senator James Byrnes of South Carolina observed, "Never run for a train after you have caught it."

Beyond the particulars of the Ninth Circuit, there is an inevitable downside to the technique of splitting circuits. It irreversibly lessens the "federalizing function of courts of appeals."<sup>92</sup> And everyone is bound to

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<sup>88</sup> See generally R. KATZMAN, ed., JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY (1988). See supra note 25.

<sup>89</sup> Judge Kozinski was quoted, tongue in cheek, to say that he did not want to give up circuit meetings in Hawaii. D. Trigaboff, supra note 63 at 15. Stranger considerations have controlled redrawing decisions. See Baker, supra note 2, at 726 n. 288 (Canal Zone alignment in the Fifth Circuit depended on scheduled airline connections).

<sup>90</sup> See Goldman, Reagan's Judicial Legacy: Completing the Puzzle and Summing Up, 72 JUDICATURE 318 (1989). See also Hellman, supra note 71, at \_\_\_\_ n. 19.

<sup>91</sup> See W. REHNQUIST, THE SUPREME COURT - HOW IT WAS, HOW IT IS 215-34 (1987).

<sup>92</sup> Wisdom, Requiem for a Great Court, 26 LOY. L. REV. 787, 788 (1980); Wright, supra note 34, at 974.



agree that subdividing courts of appeals is a limited strategy.<sup>90</sup> The best argument against dividing existing circuits is that it is a reform that simply does not work. The division of the Fifth Circuit did not perform any lasting miracle. The larger courts of appeals, with the larger problems--the District of Columbia, Second and Ninth Circuits--practically resist any feasible division.<sup>94</sup>

In the abstract, dividing circuits might be more feasible if the entire geographical scheme could be redrawn, the approach rejected by the Hruska Commission in 1973 as too unsettling.<sup>95</sup> This would permit an initial leveling of caseload and judgeships. We might have twenty circuits of nine judges organized with roughly equal caseload under a completely redrawn system of boundary lines.<sup>96</sup> This symmetry would be gained, however, at a high cost in disruption. Much federalizing influence of the courts of appeals would be lost. The balkanized precedent of the law of the circuits would be worsened without any compensating improvements. More circuits multiply intercircuit conflicts, one of the principal banes of the federal court system.<sup>97</sup> If circuit splitting is a bad idea, circuit mincing is even worse.

Dividing the Ninth Circuit or using it as an excuse to create a system of

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<sup>93</sup>"[A]re we to continue the splitting process until it becomes mincing, with a United States Court of Appeals for the Houston Metropolitan Area?" Gee, supra note 37, at 806.

<sup>94</sup>See Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 HARV. L. REV. 542, 587 (1969); Hellman, supra note 55, at 1192-1237.

<sup>95</sup>See supra text accompanying notes 32, 40-43.

<sup>96</sup>See Rubin, Views from the Lower Court, 23 U.C.L.A. L. REV. 448, 459 (1976).

<sup>97</sup>Baker & McFarland, The Need for a New National Court, 100 HARV. L. REV. 1400, 1404-09 (1987).

microcircuits simply does not address the real problem. The cure is worse than the disease, for circuit splitting does not solve the problems of one circuit and merely postpones solution of the problems of two.<sup>98</sup>

## V. Consolidation of the Courts of Appeals

Congress must learn the common sense that dockets are mathematically distributive: to distribute the Ninth Circuit's current docket between the new ninth circuit and the new twelfth circuit will not diminish the workload but merely will divide it. The number of appeals to be heard would be the same whether those same western states comprised one circuit or two circuits. The problems of the large circuit, for which splitting is offered as a solution, are chiefly the result of adding judgeships without doing more to meet the rising caseload.

The framers of the Constitution contemplated a minimal number of federal judges to staff a few courts of quite limited jurisdiction. Alexander Hamilton, perhaps deceptively, wrote in Federalist No. 81 of a single federal judge in "four or five, or half a dozen federal districts."<sup>99</sup> Today we have 94 federal districts with 575 district judges. During their first decade, the nine courts of appeals were assigned thirty judgeships;<sup>100</sup> today there are thirteen federal circuits with 168 circuit judges.<sup>101</sup> Increases have followed the Congressional

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<sup>98</sup>See Baker, A Postscript on Precedent in the Divided Fifth Circuit, 36 Sw. L. J. 725, 742 (1982).

<sup>99</sup>A. HAMILTON, THE FEDERALIST NO. 81 at 510 (B. Wright, ed. 1961).

<sup>100</sup>Carrington, supra note 94, at 580 n. 165.

<sup>101</sup>28 U.S.C. § 44(a) (1984 Supp.).

policy to deal with caseload growth by creating judgeships. Recent growth of the bench, however, still has not kept pace. Circuit judges have been delivered in litters by omnibus acts and the litters have been getting larger. Ten new circuit judgeships were created in 1961;<sup>102</sup> only five years later, ten more were added;<sup>103</sup> two years later thirteen more;<sup>104</sup> in 1978 thirty-five new circuit judgeships were created;<sup>105</sup> and in 1984 another twenty-five judgeships were added.<sup>106</sup> Adding judges is a way to respond to growth in caseload, of course, but this ad hoc solution may contribute as much to the problems of the large court. The turn of the century design for consistency and harmony in the law--that the same three-judge panel would decide all the appeals in a circuit--passed from the scene a long time ago. Today there are thousands of permutations of three-judge panels in the large courts of appeals. Monitoring the law becomes more onerous. Intracircuit conflicts become more likely. En banc rehearings become unwieldy.<sup>107</sup> Relationships of judge to judge, panel to panel, and panel to en banc court become more complex and tenuous.<sup>108</sup> Worst,

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<sup>102</sup> Act of May 19, 1961, Pub. L. No. 87-36, 75 Stat. 80.

<sup>103</sup> Act of Mar. 18, 1966, Pub. L. No. 89-372, 80 Stat. 75.

<sup>104</sup> Act of June 18, 1968, Pub. L. No. 90-347, 82 Stat. 184.

<sup>105</sup> Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629.

<sup>106</sup> Act of July 10, 1984, Pub. L. No. 98-353, 98 Stat. 346.

<sup>107</sup> See Ainsworth, Fifth Circuit Court of Appeals Reorganization Act of 1980, 1981 B.Y.U. L. REV. 523, 526-28; Tate, The Last Year of the "Old" Fifth (1891-1981), 27 Loy. L. REV. 689, 690-93 (1981).

<sup>108</sup> See Edwards, The Rising Workload and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies, 68 Iowa L. Rev. 871, 918-19 (1983); Ginsburg, Reflections on the Independence, Good Behavior, and Workload of Federal Judges, 55 U. Colo. L. Rev. 1, 10-11 (1983).

adding judgeships does not achieve any lasting improvement. A detailed study of the omnibus judgeship statutes found only a one year impact on the appeals per panel ratio; "[t]he increase in judges only delayed what appears to be a nearly inexorable climb in appeals taken to the courts of appeals."<sup>109</sup> The major benefit thus has been merely a kind of braking effect. To go on merely adding judges will worsen the unintended effects on the courts of appeals. Increasing the number of circuit judgeships, within the existing structure, should be a reform of last resort.<sup>110</sup> It may be that economic concerns will make Congress a more reluctant midwife, as new judgeships become more expensive in an era of tightening budgets.

A decade ago, one federal jurisdiction seer predicted that by the twenty-first century 5,000 circuit judges would be filling 1,000 volumes of federal reporter, umpteenth series, disposing of more than a million appeals--each year.<sup>111</sup> More recent estimates from the Administrative Office of the United States Courts predict an increase from 38,000 filings in 1988 to 66,000 filing in the year 2000.<sup>112</sup> Increases in filings of this magnitude will render the creation of additional judgeships an inevitable last resort.

This inevitability raises the question whether there is some maximum size

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<sup>109</sup>N. McLAUCHLAN, FEDERAL COURT CASELOADS 107 (1984). See also generally Markey, On the Present Deterioration of the Federal Appellate process: Never Another Learned Hand, 33 S. DAK. L. REV. 371 (1988).

<sup>110</sup>"Congress recognize[s] that a point is reached where the addition of judges decreases the effectiveness of the court, complicates the administration of uniform law and potentially diminishes the quality of justice within a circuit." Heflin, Fifth Circuit Court of Appeals Reorganization Act of 1980--Overdue Relief for an Overworked Court, 11 CUM. L. REV. 597, 616 (1980-81) (citation omitted). See also Higginbotham, Bureaucracy--The Carcinoma of the Federal Judiciary, 31 ALA. L. REV. 261, 270 (1980).

<sup>111</sup>See Barton, Behind the Legal Explosion, 27 Stan. L. Rev. 567, 567 (1975).

<sup>112</sup>Position Paper, supra note 53, at 4.



of a court sitting in panels.<sup>113</sup> A committee of the Judicial Conference selected the number nine in 1964, apparently based on the numerology of the Supreme Court which became revelation at the failure of the 1937 court-packing plan.<sup>114</sup> The Judicial Conference's last official position, in 1974, was to set the maximum per court of appeals at fifteen judgeships.<sup>115</sup> Senate sponsors of S. 948 used this argument and this figure to urge the division of the Ninth Circuit.<sup>116</sup> A hardline approach likewise would call for the division of the Fifth Circuit, once divided just nine years ago, because it has fifteen judgeships and has requested two more. If Congress passes the pending judgeship bill, five of the twelve circuits will have fifteen or more judges.<sup>117</sup> In fact, the new ninth circuit to be created by S. 948 with nineteen judgeships would itself be a candidate for immediate division under a rule of fifteen.

Adding judges and dividing courts of appeals is exactly the wrong direction for reform. If the addition of judges is accepted as inevitable, Congress ought to consider consolidation of the intermediate tier. The Ninth Circuit thus is better viewed as a harbinger than an aberration. Since 1978, the Ninth Circuit

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<sup>113</sup>"There is general recognition today that there is a natural upper limit on the number of federal court of appeals judges and that we are either near, or have already exceeded, that limit." Posner, supra note 24, at 762. See also C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3510, at 330 (1984).

<sup>114</sup>1964 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 15. But see 1967 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9 (recommendation of 13 and 15 judges respectively for the Ninth and Fifth Circuits).

<sup>115</sup>1974 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 48.

<sup>116</sup>135 Cong. Rec. at S5027 (Statement of Sen. Hatfield).

<sup>117</sup>Position Paper, supra note 53, at 4.

has pursued reorganization and modernization while exceeding each successively accounted norm of number of judges, calling into question those norms and the very notion that there is a norm. Innovations in appellate procedures have been augmented with technology. Reorganization into administrative units has helped manage caseload. A reformed en banc has been limited for the larger scaled court. Computers have helped improve caseload monitoring. Modern communications link chambers in San Francisco and Honolulu almost as instantaneously and just as reliably as two chambers on different floors of the same courthouse. Rather than divide the Ninth Circuit to make two new courts which resemble the beleaguered other circuits, Congress ought to hold the mirror the other way. The tentative lesson to be learned from the Ninth Circuit may be that reorganization and modernization today make possible a consistent and efficient court of appeals regardless of size, or at least at an order of magnitude of judgeships far beyond currently articulated norms. The preferred legislative attitude therefore should be in the direction of consolidation.

Consolidation of the intermediate tier holds the promise of eliminated, or at least drastically reduced intercircuit conflicts, a peculiar evil of our current structure.<sup>118</sup> Two innovations against caseload growth and judgeship creation, the en banc rehearing and the law of the circuit, work in tandem to generate an ersatz autonomy that makes the intercircuit conflict possible. When Congress continued to create judgeships to deal with increases in filings, more permutations of three-judge panels began to threaten two institutional values of the intermediate court: consistency among panel decisions and the control of a majority of the judges over the law of the court of appeals. The en banc court

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<sup>118</sup>Baker & McFarland, supra note 97 at 1404-09; Baker, supra note 2, at 720-24.

evolved as a mechanism to preserve these two values. En banc rehearings cause considerable expense and delay, for litigants and court alike. Consequently, there developed a concept of the law of the circuit or the law of interpanel accord. This concept was conceived to minimize en banc rehearings by preventing intracircuit conflicts: a three-judge panel must adhere to previous panel decisions as binding precedent, absent an intervening decision by the en banc court or the Supreme Court. This regional stare decisis results in fewer intracircuit conflicts, but it makes possible intercircuit conflicts, since decisions by other courts of appeals are merely persuasive authorities. As a result, each court of appeals has become a junior supreme court, final if not infallible on an issue of federal law in each circuit unless and until the Supreme Court grants review. Since the Supreme Court reviews less than 1% of courts of appeals decisions, the balkanization of federal law has grown more serious with the growing circuit dockets over the years.<sup>119</sup> A most radical solution to this problem would be to reorder a complete consolidation of the existing circuit boundaries.

The idea of a single, unified national court of appeals has an alluring simplicity: eliminate altogether the geographical boundaries between the courts of appeals and consolidate them into one unified administrative and jurisdictional tier of intermediate court. Logically then there could be no such thing as an intercircuit conflict, of course, but the unified court seemingly would require some appropriate mechanism to deal with the equally logical inevitability of more numerous intracircuit conflicts among three-judge panels. From time to time, various commentators have considered this

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<sup>119</sup>Baker & McFarland, supra note 97, at 1406.

proposal.<sup>120</sup>

The unified model depends on a concept that there be a single United States Court of Appeals. All geographical circuits would be abolished, and presumably the Federal Circuit would be absorbed, as well. Professor Paul D. Carrington, a chief proponent of this model, believes that this would relieve the circuit judges of their preoccupation with maintaining the law of the circuit (an effort he discredits as misguided) and also would make more efficient use of judicial personnel. A unified model presents sophisticated organizational options for administering such a necessarily complex institution. This paper relies on Professor Carrington's blueprint for dealing with the judicial diseconomies of scale, although not all his ideas are inherent in the model or self-evident.<sup>121</sup> There are many possible variations on his theme. Professor Carrington's formulation includes "General Divisions," "Special Divisions," and a national "Administrative Panel" which presumably would resemble the present Judicial Conference of the United States.

Appeals would continue to be decided by three judge-panels. Three-judge panels, however, would be constituted from among "General Divisions," usually comprised of four judges from four different but proximate states. Thus there would be forty or more regular General Divisions. Active circuit judges would be assigned to General Divisions by a national Administrative Panel which would be chosen by seniority to serve for a substantial term of years. Some provision

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<sup>120</sup>See generally Burdick, Federal Courts of Appeals: Radical Surgery or Conservative Care, 60 KY. L.J. 807, 812 (1972); Carrington, supra note 94; Rosenberg, Planned Flexibility to Meet Changing Needs of the Federal Appellate System, 59 CORNELL L. REV. 576, 591-95 (1974); Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?, 71 CALIF. L. REV. 913, 940-41 (1983).

<sup>121</sup>See Carrington, supra note 94; Carrington, supra note 16.



might be made for automatic rotation among General Divisions that prove too stable in membership (e.g., no change in membership for three years).

Each General Division would have jurisdiction to hear appeals from an appropriate number of specifically identified district judges. The district judges whose appeals were earmarked to a particular General Division would sit in one of the four states represented on the General Division. Although different General Divisions of the court of appeals would regularly review different district judges in the same district, still each individual district judge and the litigants in the case would have a fairly good idea of the appellate panel from the moment a matter was assigned to the trial judge. The argument is that any cost of greater perceived differences among trial judges in the same district, because they would be reviewed by different three-judge panels, would be offset by the benefit of the identifiable and stable appellate panel.

Appellate procedures would be characterized by greater orallity.<sup>122</sup> Indeed, the new appellate procedure in the typical appeal would imitate the English tradition with an emphasis on oral presentations by the advocates and an oral decision, with assurance of disclosure of the reactions of each panel member, delivered from the bench without conference. The written opinion for the court, John Marshall's innovation of the nineteenth century, would no longer be the norm.<sup>123</sup> Every effort would be made to take full advantage of modern

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<sup>122</sup>See Meador, Toward Orallity and Visibility in the Appellate Process, 42 MD. L. REV. 732 (1983).

<sup>123</sup>See Lumbard, Current Problems of the Federal Courts of Appeals, 54 CORNELL L. REV. 29, 38 (1968); Merrill, Could Judges Deliver More Justice if They Wrote Fewer Opinions?, 64 JUDICATURE 435 (1981).

technology, by experimenting, for example, with closed circuit televised hearings.<sup>124</sup>

The operative assumption would be that only in a small fraction of the appeals would the three-judge hearing panel determine that a full written opinion would be necessary and appropriate. This determination might be made at the oral presentation just described. In these appeals, the hearing panel would be augmented to seven judges, as described below. The likely case for this augmented hearing would be an appeal raising a substantial issue of federal law, for example, a difficult issue of statutory construction. Only these augmented hearings would result in the published opinion produced in the Marshall manner, with a conference of the judges, collegial deliberation, and extended revisions of drafts. With the exception, of a Special Division en banc rehearing explained below, these augmented panel decisions would be the law of the land, normally without expectation of further review in the Supreme Court, given their statutory nature. Thus the current notion of the law of the circuit would be expanded nationally. More correctly, this would undo the perversion of "percolation" which is fundamentally "hurtful to the inherent nature of a national law."<sup>125</sup>

The augmentation of the hearing panel from three to seven judges in the Marshall style opinion-of-the-court type appeals would come from the membership of "Special Divisions." Assignment of a judge to a Special Division of approximately eight judges, by subject matter, would be supplementary to the General Division assignment, keyed to the identity of the district judge,

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<sup>124</sup>Baker, supra note 31, at 264.

<sup>125</sup>Baker, Siskel and Ebert at the Supreme Court, 87 MICH. L. REV. 1472, 1487 (1989).

already described. Thus, each active circuit judge would have a General Division assignment and a Special Division assignment. Special Division assignments would ~~last perhaps~~ as long as eight years and would be made by the national Administrative Panel by some calculus to include preference, seniority, location, and lot. There might be some provision for rotation, one judge off/one judge on, each year, but the Special Divisions would be selected to assure substantial stability.

There would be a Special Division for each subject in which a substantial number of full opinions would be required, for examples: antitrust and related economic regulation, taxation, intellectual property, bankruptcy, government contracts, labor law, securities regulation, federal tort claims, federal crimes, federal civil procedure, federal criminal procedure, civil rights legislation, et cetera. Special Divisions could be created or abolished by the national Administrative Panel. These assignments might be analogized to committee assignments in the Congress which develop a particular expertise, to go along with a generalist's competence. Each Special Division would be expected to maintain a coherent body of law on its subject matter. The present en banc responsibility would be shifted to the Special Divisions which, if necessary, could sit en banc and review the augmented seven judge hearing panel.

This unified model, distinguished from the current system by greater orality and greater subject matter specialization, is designed to realize the ideal of an appellate system that is speedy, inexpensive, and just. Greater coherency in the national law is an important purpose behind this design. An effort to compromise the generalist-court versus specialist-court debate is much

in evidence.<sup>126</sup> Subject matter grouping of appeals, which would be of dubious worth within the present regional circuits, would offer substantial efficacy in dealing with a national docket of a national court.<sup>127</sup> Intercircuit conflicts would be eliminated by definition. The likelihood of intracircuit conflicts would be lessened, first, by the constancy of the General Division in less significant appeals decided orally in summary fashion and, second, by the expertise of the Special Division in augmented panels and the capability of en banc rehearing. The delay and cost of panel rehearing and en banc rehearing in the current system would be replaced by the augmented panel and Special Division en banc rehearing, presumably with comparable measures of cost and delay, but with an expectation for greater coherency in the law.

The most obvious critical response to the unified model is to condemn it as specialization of the federal judiciary. As has been suggested, however, this model is more fairly viewed as a compromise of that debate, which will not be rehearsed here. Other objections are more substantial.

First, each General Division, unrestrained by publishing an opinion in the run of the cases, is a potential aberration from the national law. This risk seems no different, however, from the current system of three-judge panels, subject to altogether rare en banc review and Supreme Court discretionary review. There is an admitted trade-off between the geographical stability in

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<sup>126</sup> See Meador, An Appellate Court Dilemma and a Solution Through Subject Matter Organization, 16 U. MICH. J.L. REF. 471 (1983); Overton, A Prescription for the Appellate Caseload Explosion, 12 FLA. ST. U. L. REV. 205 (1984). See also generally Report of the A.B.A. Standing Committee on Federal Judicial Improvements, The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth (1989).

<sup>127</sup> See Meador, Appellate Subject Matter Organization: The German Design From an American Perspective, 5 HASTINGS INT'L & COMP. L. REV. 27 (1981).



the present system and the doctrinal stability promised in the model, but the conceded purpose of the model is to shift judicial emphasis from making the law of the circuit to making the national law on a particular subject.

Administrative worries are somewhat daunting, on first impression. Case assignment, however, is just as automatic in most courts of appeals in the current system.<sup>128</sup> Techniques and technologies developed in the larger circuits, especially the Ninth Circuit, might help measure the feasibility of administering a unified intermediate court. Of course, regional administration, similar to the current clerks' offices, would be possible.

Ancillary decisional differences may be exacerbated in the model. For example, the Special Division on Antitrust might interpret the same ancillary procedural issue differently from the Special Division on Civil Rights Legislation. Arguably, the harmony in the principal subjects might be worth this and, perhaps, the procedural Special Division could reconcile such differences. Any loss of collegiality upon the elimination of the current geographic circuits would be more than made up for in the assignments to a four-member General Divisions and an eight-member Special Division.

Finally, the notion that this organization would make it easier for Congress to add judges is quite apt, for the unified model can absorb an indeterminate number of circuit judges to be arranged in greater numbers of General and Special Divisions of expanding membership. This weakness may be the model's greatest strength, however. While adding judges to the court of appeals is a remedy to be resisted, the political reality of the last fifty years

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<sup>128</sup> See Deane & Tehan, Judicial Administration in the United States Court of Appeals for the Ninth Circuit, 11 GOLDEN GATE L. REV. 1 (1981); Whittaker, Differentiated Case Management in the United States Courts of Appeals, 63 F.R.D. 457 (1974).

suggests judgeship creation is virtually inevitable. Therefore, any model ought to be designed to absorb new circuit judges.

## VI. Conclusion

Admittedly, some do not deem the current circuit boundary lines to be as ephemeral and arbitrary as this Background Paper and Professor Carrington's proposal make them out to be. There are certain settled expectations of substantive law and practice, and procedure drawn up with the twelve regional courts of appeals. But the strategy of adding judges and dividing circuits simply has been played out and is no longer defensible as a long-range plan. That is why S. 946 is an idea whose time has come and gone. The justifications offered so far for dividing the Ninth Circuit simply do not withstand a close scrutiny. Inconsistency in precedents is the product of a large docket. But existing and proposed mechanisms can minimize this diseconomy of scale. Furthermore, the more numerous precedents on an issue to be found in the large circuit might actually impose greater consistency on hearing panels.<sup>129</sup> The speculative political purpose to affect the law of the circuit likewise seems unnecessary and ill-advised.

Arguably, on the occasion of a congressionally-commissioned evaluation of the kind being conducted currently by the Federal Courts Study Committee, assumptions and settled expectations ought to be set aside or, at least, ought to be drawn into question. The history of the circuit boundaries teaches that "[m]erely redrawing court boundaries would have the same effect on the present

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<sup>129</sup>Hellman, supra note 71, at \_\_\_\_.

federal appellate crisis that a weatherman's map marks have on the weather."<sup>130</sup> That is why S. 948 is so unsatisfactory, the approach so anachronistic. And that is why consolidation is so intriguing. Consolidation of the circuits into single, unified court of appeals would allow for other innovations in case management and subject matter specialization that promise to help solve the profound problems facing the intermediate tier. If complete consolidation is considered too radical, then Congress at least ought to consider regrouping the existing circuits into four to six mega-circuits to achieve at least some of the economies of consolidation.<sup>131</sup> This idea deserves more studied consideration.

The Ninth Circuit ought to be thought of as a model for the courts of appeals, not as a problem.

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<sup>130</sup> Baker, supra note 31, at 290.

<sup>131</sup> See Wallace, supra note 117, at 940-41.

APPENDIX  
(Chronological Table of Federal Circuits\*)

Circuits	Act of Sept. 24, 1789, Ch. 20, 1 Stat. 73	Circuits	Act of Feb. 13, 1801, Ch. 4, 2 Stat. 89	Circuits	Act of April 29, 1802, Ch. 31, 2 Stat. 154	Circuits	Act of Mar. 3, 1837, Ch. 34, 5 Stat. 176
Eastern	Conn. Mass. N.H. N.Y. R.I. <sup>1</sup> Vt. <sup>2</sup>	1.	Me. Mass. N.H. R.I.	1.	Me. <sup>4</sup> Mass. N.H. R.I.	1.	Me. Mass. N.H. R.I.
		2.	Conn. N.Y. Vt.	2.	Conn. N.Y. Vt.	2.	Conn. N.Y. Vt.
Middle	Del. Md. N.J. Pa. Va.	3.	Del. N.J. Pa.	3.	N.J. Pa.	3.	N.J. Pa.
		4.	Md. Va.	4.	Del. Md.	4.	Del. Md.
Southern	Ga. N.C. <sup>3</sup> S.C.	5.	Ge. N.C. S.C.	5.	N.C. Va.	5.	N.C. <sup>10,13</sup> Va. <sup>13</sup>
		6.	Ky. Ohio <sup>4</sup> Tenn.	6.	Ge. S.C. <sup>10</sup>	6.	Ge. <sup>10</sup> S.C. <sup>10</sup>
Independent Districts	Ky. <sup>4</sup> Me. <sup>4</sup> Tenn. <sup>3</sup>			7.	Ky. <sup>4,7</sup> Ohio <sup>4</sup> Tenn. <sup>4,7</sup>	7.	Ill. <sup>11,18</sup> Ind. <sup>11,17</sup> Mich. <sup>4,18</sup> Ohio <sup>4,17</sup>
				Independent Districts	Ala. <sup>8</sup> Ark. <sup>8</sup> Ill. <sup>8</sup> Ind. <sup>8</sup> La. <sup>8</sup> Mich. <sup>4,8</sup> Miss. <sup>8</sup> Mo. <sup>8</sup>	8.	Ky. <sup>14</sup> Mo. <sup>19</sup> Tenn. <sup>14</sup>
						9.	Ala. <sup>9</sup> Ark. <sup>14</sup> La. <sup>9,14</sup> Miss. Wis. <sup>11,18</sup>
						10.	Cal. <sup>12</sup> Nev. <sup>13</sup> Ore. <sup>12</sup>
				Independent Districts			Fla. <sup>8</sup> Iowa. <sup>8,19</sup> Kan. <sup>8,19</sup> Minn. <sup>8,19</sup> Tex. <sup>8,16</sup>

\* Adapted from Chronological Table, 1 Fed. Cas. x-xi (1894).



APPENDIX  
(Continued)

§ C	Act of July 23, 1866, Ch. 200, 34 Stat. 389	§ C	Act of Mar. 3, 1891, 26 Stat. 638	§ C	Act of Feb. 25, 1925, Pub. L. No. 70-400, 43 Stat. 1346	§ C	Act of Oct. 14, 1900, 34 Stat. 1994
1.	Mo. N.R. Mass. R.I.	1.	Id. N.R. Mass. R.I.	1.	Id. P.R. <sup>20</sup> Mass. R.I.	1.	Id. P.R. Mass. R.I.
2.	Conn. Vt.	2.	Conn. Vt.	2.	Conn. Vt.	2.	Conn. Vt.
3.	Del. Pa.	3.	Del. Pa.	3.	Del. Pa. V.I. <sup>21</sup>	3.	Del. Pa. V.I.
4.	Id. Va. N.C. W. Va. S.C. <sup>22</sup>	4.	Id. Va. N.C. W. Va. S.C.	4.	Id. Va. N.C. W. Va. S.C.	4.	Id. Va. N.C. W. Va. S.C.
5.	Ala. La. Fla. Minn. <sup>23</sup> Ga. Tex.	5.	Ala. La. Fla. Minn. Ga. Tex.	5.	Ala. La. C.Z. <sup>23</sup> Minn. Fla. Tex.	5.	C.Z. Minn. La. Tex.
6.	Ky. Ohio Mich. Tenn.	6.	Ky. Ohio Mich. Tenn.	6.	Ky. Ohio Mich. Tenn.	6.	Ky. Ohio Mich. Tenn.
7.	Ill. Wis.	7.	Ill. Wis.	7.	Ill. Wis.	7.	Ill. Wis.
8.	Ark. <sup>24</sup> Mo. Cal. <sup>25</sup> Neb. <sup>26</sup> Iowa N.D. <sup>27</sup> Kan. S.D. <sup>28</sup> Minn. Wyo. <sup>29</sup>	8.	Ark. Mo. Cal. Neb. Iowa N.D. Kan. S.D. Minn. Wyo.	8.	Ark. Neb. Iowa N.D. Minn. S.D.	8.	Ark. Neb. Iowa N.D. Minn. S.D.
9.	Alaska <sup>34</sup> Nev. Col. Ore. Idaho Wash. <sup>35</sup> Mont. <sup>36</sup>	9.	Alaska <sup>34,35</sup> Nev. Idaho Ore. Mont. Wash.	9.	Alaska Mont. Ark. Nev. Cal. Ore. Hawaii <sup>34</sup> Wash.	9.	Alaska Mont. Ark. Nev. Cal. Ore. Hawaii <sup>35</sup>
				10.	Cal. <sup>36</sup> Ohio <sup>36</sup> Kan. <sup>36</sup> Utah <sup>36</sup> N.M. <sup>27,38</sup> Wyo. <sup>38</sup>	10.	Cal. Ohio Kan. Utah N.M. Wyo.
						11.	Ala. Ga.
						D.C.	Dist. of Col. <sup>39</sup>

## NOTES TO APPENDIX

1. Rhode Island was added to the eastern circuit by Act of June 23, 1790, ch. 21, 1 S. 128.
2. Vermont was added to the eastern circuit by Act of March 2, 1791, ch. 12, 1 Stat. 197.
3. North Carolina was added to the southern circuit by Act of June 4, 1790, ch. 17, 1 Stat. 126.
4. Circuit court powers were conferred upon the district courts of the independent districts of Maine and Kentucky by Act of September 24, 1789, ch. 20, 1 Stat. 73. By Act of March 30, 1820, ch. 27, 3 Stat. 554, Maine was added to the first circuit.
5. Circuit court powers were conferred upon the district courts of Tennessee by Act of January 31, 1797, ch. 2, 1 Stat. 496.
6. By Act of February 24, 1807, ch. 16, 2 Stat. 420, Ohio, Kentucky, and Tennessee constituted the seventh circuit. By Act of January 28, 1863, ch. 13, 12 Stat. 637, Ohio and Michigan constituted the seventh circuit.
7. Kentucky and Tennessee were made independent districts by Act of April 29, 1802, ch. 31, 2 Stat. 156.
8. Circuit court powers were conferred upon the district courts of the following independent districts: Louisiana by Act of April 8, 1812, ch. 50, 2 Stat. 703; Indiana by Act of March 3, 1817, ch. 100, 3 Stat. 390; Mississippi by Act of April 2, 1818, ch. 29, 3 Stat. 413; Illinois by Act of March 3, 1819, ch. 70, 3 Stat. 502; Alabama by Act of April 21, 1830, ch. 47, 3 Stat. 564; Missouri by Act of March 16, 1822, ch. 12, 3 Stat. 653; Arkansas by Act of June 15, 1836, ch. 100, 5 Stat. 50; Michigan by Act of July 1, 1835, ch. 234, 5 Stat. 62; Florida by Act of March 3, 1845, ch. 75, 5 Stat. 788; Iowa by Act of March 3, 1845, ch. 76, 5 Stat. 789; Texas by Act of December 29, 1845, ch. 1, 9 Stat. 1; Minnesota by Act of May 11, 1858, ch. 31, 11 Stat. 285; and Kansas by Act of January 29, 1861, ch. 20, 12 Stat. 128.
9. Alabama and Louisiana constituted the fifth circuit by Act of August 16, 1842, ch. 180, 5 Stat. 507.
10. North Carolina, South Carolina, and Georgia constituted the sixth circuit by Act of August 16, 1842, ch. 180, 5 Stat. 507. South Carolina was divided into the eastern and western districts by Act of February 21, 1825, ch. 11, 3 Stat. 726. Circuit court powers were conferred upon the district court for the western district by Act of August 16, 1856, ch. 119, 11 Stat. 43. A circuit for the western district was established by Act of February 6, 1889, ch. 113, 25 Stat. 655. Terms for the circuit court for the districts of South Carolina were regulated by Act of April 26, 1890, ch. 165, 26 Stat. 71.
11. Indiana, Illinois, and Wisconsin constituted the eighth circuit by Act of January 28, 1863, ch. 131, 12 Stat. 637. Wisconsin was transferred to the ninth circuit by Act of February 9, 1863, 12 Stat. 648.
12. California constituted a separate circuit by Act of March 2, 1885, ch. 142, 10 Stat. 631 and, with Oregon, constituted the tenth circuit by Act of March 3, 1863, ch. 100, 12 Stat. 794.
13. Virginia was added to the fourth circuit by Act of August 16, 1842, ch. 180, 5 Stat. 507. Nevada was added to the tenth circuit by Act of February 27, 1865, ch. 64, 13 Stat. 440. North Carolina was added to the fourth circuit by Act of July 15, 1862, ch. 178, 12 Stat. 576. Nebraska was added to the eighth circuit by Act of March 25, 1867, ch. 7, 15 Stat. 5. Colorado was added to the eighth circuit by Act of June 26, 1876, ch. 147, 19 Stat. 61. Montana was added to the ninth circuit by Act of February 22, 1889, ch. 180, 25 Stat. 682. North Dakota and South Dakota were added to the eighth circuit by Act of February 22, 1889, ch. 180, 25 Stat. 682. Washington was added to the ninth circuit by Act of February 22, 1889, ch. 180, 25 Stat. 682. Idaho was added to the ninth circuit by Act of July 3, 1890, ch. 656, 26 Stat. 217. Wyoming was added to the eighth circuit by Act of July 10, 1890, ch. 664, 26 Stat. 225.
14. Certain circuit court powers were conferred on the district courts of Alaska and writs of error in criminal cases were authorized to issue from the circuit court for the district of Oregon to the district court of Alaska by Act of May 17, 1884, ch. 53, 23 Stat. 24.
15. Circuit courts were established in Arkansas and Mississippi by Act of February 6, 1889, ch. 113, 25 Stat. 655.
16. Louisiana, Texas, Arkansas, Kentucky, and Tennessee constituted the sixth circuit by

17. Ohio and Indiana constituted the seventh circuit by Act of July 15, 1862, ch. 178, 12 Stat. 576.
18. Michigan, Wisconsin, and Illinois constituted the eighth circuit by Act of July 15, 1862, ch. 178, 12 Stat. 576.
19. Missouri, Iowa, Kansas, and Minnesota constituted the ninth circuit by Act of July 15, 1862, ch. 178, 12 Stat. 576.
20. Puerto Rico was added to the First Circuit by Act of January 28, 1915, ch. 22, 38 Stat. 803.
21. The Virgin Islands were added to the Third Circuit by Act of February 13, 1925, ch. 229, 43 Stat. 936.
22. The district of the Canal Zone was added to the Fifth Circuit by Act of February 13, 1925, ch. 229, 43 Stat. 936.
23. Decisions of the district courts in Alaska were made reviewable in the Ninth Circuit Court of Appeals by Act of February 13, 1925, ch. 229, 43 Stat. 936.
24. Hawaii was included in the Ninth Circuit by Act of March 3, 1911, ch. 231, 36 Stat. 1131.
25. Arizona was included in the Ninth Circuit by Act of February 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346.
26. Oklahoma was included in the Eighth Circuit by Act of March 3, 1911, ch. 231, 36 Stat. 1131.
27. New Mexico was included in the Eighth Circuit by Act of March 4, 1921, ch. 149, 41 Stat. 1361.
28. Colorado, Wyoming, Utah, Kansas, Oklahoma, and New Mexico constituted the Tenth Circuit Court of Appeals by Act of February 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346.
29. Guam was added to the Ninth Circuit by Act of October 31, 1951, Pub. L. No. 82-248, 65 Stat. 723.
30. The Court of Appeals for the District of Columbia Circuit was recognized as a separate circuit by Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 870.

Note: This Appendix is reproduced from 35 Sw. L.J. at 736-39. Since it was compiled, Congress created the United States Court of Appeals for the Federal Circuit. Pub.L. 97-164, 96 Stat. 25 (1982).

Discretionary Review

by

Kathy Lanza\*

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\*Kathy Lanza is the Senior Staff Attorney at the First Circuit Court of Appeals. She has also been employed as a law clerk to a federal court of appeals judge and as a staff attorney at a state intermediate appellate court.

### Discretionary Review

A fundamental question is how to manage the burgeoning case loads in the federal circuit courts of appeal. One possibility is to abolish appeals of right -- either across the board or in selected areas -- and institute instead a system of discretionary review. That is, instead of filing a notice of appeal, a disappointed litigant wishing appellate review would file a petition requesting further review which the court of appeals would have the discretion to deny without stating reasons or being obliged to pass on the correctness of the lower court decision.<sup>1</sup> Whether such a system would enable judges to dispose of cases more efficiently while preserving the basic functions of an intermediate appellate court is examined herein.

Appellate courts have been perceived as having two basic functions. The first is error correction. That is, the appellate court serves as the body available to pass on the correctness of judgments of lower courts or decisions of

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1. While most states afford at least criminal defendants one appeal as of right, see Bundy v. Wilson, 815 F.2d 125, 136-142 (1st Cir. 1987) (summarizing the criminal appellate systems in each state, the District of Columbia, and Puerto Rico and noting that only New Hampshire, Virginia, and West Virginia do not provide for mandatory criminal appellate jurisdiction), there is no federal constitutional right to an appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983); McKane v. Durston, 153 U.S. 684, 687 (1894). Therefore, presumably, a system of discretionary appellate review at the federal circuit court of appeals level could be legislated without offending litigants' constitutional rights.



administrative agencies, thereby protecting litigants from abuse of power or aberrant or erroneous decision makers. The second is law clarification or law making. Unclearities and interstices in the law can produce conflicting decisions among first level judicial decision makers. This lack of uniformity, in turn, can undermine confidence in the judicial system and lead to uncertainty in daily affairs when outcomes cannot be predicted, but rather turn on the identity of the decision maker. Consequently, "appellate courts are needed to announce, clarify, and harmonize the rules of decision employed by the legal system in which they serve."<sup>2</sup>

A discretionary system of review would not impede an appellate court's law making function. The court would be able to select for review those cases presenting issues where clarification of legal principles was needed or where conflicts with other first tier decision makers existed. Indeed, a prime reason advanced for restricting or abolishing appeals of right is to free appellate courts from deciding cases in which the outcome is only of interest to the litigants involved so that the appellate court can devote more time to law clarification and resolving cases of wider, institutional concern.

This is not to say, of course, that a system of discretionary review would guarantee that the law making

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2. P. Carrington, D. Meador, M. Rosenberg, Justice on Appeal 3 (1976).

function would actually be exercised in every appropriate case calling for conflict resolution or law development. Rather, a court with discretionary jurisdiction could evade tough or controversial matters simply by denying petitions for review.<sup>3</sup> Checks -- such as allowing district courts to certify cases for appeal which the appellate court must then accept or requiring an appellate court to state why jurisdiction was declined -- have been proposed.<sup>4</sup> Their effectiveness is conjectural. Rather, much reliance will rest on the institutional commitment of the appellate judges themselves.<sup>5</sup>

The more troublesome question is the impact of a system of discretionary review on the courts of appeals' error correction function.

The experience of several courts would suggest that a strong commitment to correcting error in lower court judgments is not incompatible with a discretionary system of review.

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3. See Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62, 72 (1985) ("troubling is the possibility that appellate courts, left to their own devices, will on occasion knowingly duck issues in need of resolution").

4. Id., 72-73.

5. See Douglas, III, Summary Disposition: The New Hampshire Supreme Court's Innovative and Unique Approach to Appellate Case Processing, 27 N.H. Bar J. 211, 214 (1986) where a former justice of the state's only appellate court expresses the opinion that the court's procedures which allow it to decline review in any case "is not used to 'duck' tough or important cases, but is used only to weed out the insignificant cases so that judicial resources may be put to more efficient use."

Virginia and West Virginia are two states which do not accord criminal defendants an appeal of right. In Virginia, the decision of the Court of Appeals (an intermediate appellate court) whether to accept a criminal appeal is made after the record has been filed and the defendant has presented a petition for appeal detailing the merits of the appeal. The petition for appeal is the functional equivalent of an appellate brief, and, if leave to appeal is allowed, the defendant may simply refile his petition as his brief, at least with respect to those issues on which review was granted. The Commonwealth will generally file a reply to the defendant's petition. Defendant is entitled to oral argument, which lasts 15 minutes, in front of a three judge panel. The Commonwealth does not argue. Any one judge may grant the petition for appeal. The court is committed to error correction and, if convinced that error may have occurred below, will grant the petition, even if the case is not of precedential importance.<sup>6</sup> Consequently, the denial of a petition for appeal would appear, in substance, to be tantamount to an affirmance of the judgment below.

West Virginia has no intermediate appellate court. A civil or criminal litigant commences the appellate process by

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6. Information on the practice of the Court of Appeals of Virginia was obtained from Robert L. Bixby, Chief Staff Attorney. See also Bundy v. Wilson, 815 F.2d 125, 141 (1st Cir. 1987) (summarizing Virginia appellate criminal procedure).

filing a petition for appeal. The state's appellate court, the Supreme Court of Appeals, may reject an appeal. The decision whether to grant or deny a petition for appeal is made after examining the record (including a trial transcript) and the appellant's petition. The petition, which in form is much like an appellate brief, includes a statement of facts, an assignment of errors, and a discussion of the appellate issues with citations to pertinent legal authority. The respondent may file an opposition and does so in roughly 10 percent of the cases. Approximately 40 percent of petitioners request oral argument, requests which are generally granted. Argument time generally is short, 5 to 6 minutes. The respondent is not permitted to argue. A majority vote of the five member court is required to grant a petition for review. If, after a review of the record, prejudicial error is perceived, the petition will be granted.<sup>7</sup>

Also relevant is the United States Court of Military Appeals. It hears appeals from Courts of Military Review. While a portion of its docket is mandatory, the bulk is discretionary.<sup>8</sup> A petition for review may be in brief form,

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7. Information on the West Virginia Supreme Court of Appeals was obtained from Thomas McQwain, deputy clerk of the court. See also Bundy v. Wilson, 815 F.2d 125, 141 (1st Cir. 1987) (summarizing West Virginia procedure).

8. D. Meador, Appellate Courts: Staff and Process in the Crisis of Volume 217 (1974).

much like a brief on the merits filed in other appellate courts, and the government may file a response.<sup>9</sup> Procedure thereafter has been succinctly described as follows:

"[T]he court views itself as being under a congressional mandate to search the record in every case to insure that the convicted serviceman has had a fair and error-free proceeding. Thus the [staff attorneys employed by the court] do not confine themselves to the points raised in the petitions. They read the complete record and discuss in the memorandum [they prepare for the court] all defects of any arguable substance. The judges consider themselves as primarily, though not exclusively, concerned with error correction. A petition will be granted if two of the three judges think there is the likelihood of any prejudicial irregularity, even though the issue may be of no general legal or institutional importance. ..."<sup>10</sup>

The memorandum, petition, response, and full record circulate to each of the three judges. Oral argument is not held on petitions for review. Unless two judges vote to grant the petition, it is denied without a statement of reasons.<sup>11</sup> Thus, although by statute the court has discretion to decline appeals, the judges apparently do not do so if at least two of them, after a fairly comprehensive review, feel an error may

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9. Id., 218.

10. Id., 219. While the above description was published in 1974, the court's current Deputy Staff Director, Steven Wright, described it as accurately portraying the present process.

11. D. Meador, Appellate Courts, supra note 8, at 220.



have been committed below. Hence, denial of review by the United States Court of Military Appeals, much like a denial of review by the Court of Appeals of Virginia and the West Virginia Supreme Court of Appeals, would seem tantamount to a determination that the judgment below was correct or that error, if any, was harmless.

In contrast is the New Hampshire experience. New Hampshire has no intermediate appellate court. Prior to 1979, the Supreme Court of New Hampshire by custom afforded all appellants review as of right. Beginning in 1979, however, the court amended its rules to permit it to decline appeals.<sup>12</sup> The decision in New Hampshire whether to accept an appeal is based on a form notice of appeal setting forth the sentence (in a criminal case), a brief description of the nature of the case and result, identification of any statutes on which the case was based, a statement of issues to be raised expressed "without unnecessary detail," a list of cases supporting the appellant's position, photocopies of pertinent portions of the lower court record, and transcript and exhibit requests.<sup>13</sup> Originally, the decision whether to decline an appeal was intended to be made before the parties had expended significant

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12. Douglas, III, Summary Disposition: The New Hampshire Supreme Court's Innovative and Unique Approach to Appellate Court Processing, 27 N.H. Bar J. 211, 212-13 (1986).

13. State v. Cooper, 127 N.H. 119, 125 (1985).

time and money in procuring a transcript and drafting a brief.<sup>14</sup> As a result of federal court litigation, however, defendants appealing their conviction now must be allowed to present relevant portions of their transcript before the decision to decline an appeal is made.<sup>15</sup>

Ten appeals at a time are assigned to a New Hampshire Supreme Court judge for screening. He recommends to the others what track -- whether declination of acceptance, summary disposition, assignment to pre-hearing conference for the possibility of settlement, submission on briefs without oral argument, or full briefing and oral argument -- the case should take. All five judges must agree to declination. Otherwise the case will be routed to another track.<sup>16</sup> A declination of acceptance is not a decision on the merits, "expresses no opinion on the quality or correctness of either the decision below or the arguments to be advanced by counsel on appeal," and is not a precedent for future declinations.<sup>17</sup> The result

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14. Douglas, supra note 12, at 215.

15. Pundy v. Wilson, 815 F.2d 125 (1st Cir. 1987) (due process requires that defendants seeking to persuade New Hampshire's only appellate court to accept an appeal from their conviction be afforded relevant portions of the trial transcript or an adequate written substitute, and an opportunity to submit a brief written statement specifically focusing on why the appeal should be accepted).

16. Douglas, supra note 12, at 215.

17. State v. Cooper, 127 N.H. 119, 125 (1985).

of the procedural modifications permitting declinations of acceptance and summary dismissals, one of New Hampshire's former justices has written, has been to "shift[] the Court from the role of error corrector to the role of law giver."<sup>18</sup>

A discretionary declination of appellate jurisdiction in which a panel determines whether a case is of sufficient institutional import to warrant review may well enable courts to process cases faster. Such a determination will not invariably call for a time consuming search of the record to see if error occurred below. But, if federal courts of appeal are to remain committed to the error correcting function, that is, if a basic role of said courts is to continue to be remedying prejudicial error in judgments appealed to them (or at least those errors properly preserved for and argued on appeal),<sup>19</sup> then an important question is whether significant

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18. Douglas, supra note 12, at 214.

19. Some have questioned whether appeal of right serves to correct errors. See Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62, 73-86 (1985); Resnick, Precluding Appeals, 70 Cornell L. Rev. 603, 606 (1985) (quoting former United States Solicitor General Rex Lee, who is reported to have said that "there is nothing in the Constitution and nothing in common sense that says that decisions of an appellate court are more likely to be right than a district court"). That inquiry is beyond the scope of this discussion. While the percentage of cases reversed on appeal is not high, see Annual Report of the Director of the Administrative Office of the United States Courts, Table B5 (1988) (indicating that during the twelve month period ending June 30, 1988, 14.2 % of the appeals terminated by the federal circuit courts of appeals resulted in reversal), this discussion proceeds on the premise or assumption that appellate review should and does remedy mistakes and provides better justice to litigants. See, e.g.,

efficiency in case processing and judge time can be achieved through a system of discretionary review.

One component of delay is transcript preparation. The New Hampshire Supreme Court, at least initially, apparently envisioned determining whether to grant review in some cases before a transcript was filed. (The other three courts, in contrast, have the transcript available before deciding whether to allow an appeal.) It may well be that a court, in its institutional role of resolving conflicts among lower courts, clarifying unsettled law, or determining which cases' resolution are of societal importance, can often adequately make the determination whether to permit review without a transcript. But if a firm commitment to error correction is to be maintained and if an appeal raises a question of the sufficiency of the evidence or presents issues whose resolution is dependent upon a review of portions or all of the transcript, a transcript is needed. Hence, it is unlikely that

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ABA Standing Committee on Federal Judicial Improvements, The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth 34 (1989) ("[d]iscretionary appellate jurisdiction, by a procedure like certiorari in the Supreme Court, would greatly compromise the right to appellate review traditionally recognized in our system of justice"); Lilly and Scalia, Appellate Justice: A Crisis in Virginia? 57 Va. L. Rev. 3, 13 (1971) ("where there is no intermediate appellate court and where all appeals are 'discretionary,' it would be a harsh system indeed that would render it appropriate for the court to decline a case - no matter what the sum involved or how clear the error below - simply because the controversy was of concern to no one except the litigants").

any significant economies can be achieved in this area simply by substituting discretionary for mandatory review.

As for briefing, if the appellate court is to preserve its error correcting role and not deny review in any case where prejudicial error was committed below, then unless the court is to undertake its own review of the record substantially unaided by the parties -- a potentially more time consuming approach -- the petition for review will need to be much like an appellate brief containing a statement of facts and legal analysis with citations of authority on the arguments raised. Since the petitioner/appellant's filing is unlikely to be an objective and dispassionate rendering of the proceedings below and, indeed, may omit or obfuscate crucial matters, accuracy would be enhanced by requiring a response from the other side. But once this is done, the process for determining whether to allow an appeal resembles more and more the typical summary disposition process in those appellate court which screen to separate out and summarily affirm without oral argument the frivolous or more straight forward appeals raising no novel issues. Consequently, discretionary review will not necessarily result in a significantly more streamlined briefing process.

Left then is opinion writing. Certainly a bottom line "review denied" is shorter to draft than a short per curiam explaining why the judgment below was correct. The very



process, however, of reducing reasoning to writing is a check against intuitive, impressionistic judgments which may, on further reflection, prove faulty. Further, a written opinion, even if brief, better conveys to the parties the sense that their case has received attention and -- unless the opinion is boiler plate -- an indication of the reasoning behind the result. But even if, under swelling case load pressures, decisions are to be reduced to bottom line dispositions, the choice of "affirmed" over "review denied" may be preferable, for the very act of writing affirmed, that is, of putting an imprimatur of sorts on the lower court judgment, may foster among the court and its legal staff a heightened sense of commitment to the error correction role.

Those who have studied appellate systems where review is termed discretionary but the court remains committed to correcting error even in cases of no public import have concluded that the level of judicial scrutiny is not significantly different from that in courts which, instead of denying review, summarily affirm the judgment below.<sup>20</sup> "In

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20. Appellate Courts, supra note 8, at 168-69; Justice on Appeal, supra note 2, at 133; Lilly and Scalia, Appellate Justice: A Crisis in Virginia? 57 Va. L. Rev. 3, 14 (1971) (discretionary review in Virginia was intended to serve primarily as a means of summary affirmance enabling court to dispose of clearer cases without full argument and written opinion); Marvell, Appellate Capacity and Caseload Growth, 16 Akron L. Rev. 43, 98 (1982) ("[d]iscretionary jurisdiction on first appeal is, as a practical matter, only an example of summary procedures and is, thus, actually a mechanism to reduce the judge-time spent on appeals"); ABA Standing Committee on

other words, review of petitions [to appeal], though couched as an exercise of discretion, is a review on the merits in the interest of justice to the parties."<sup>21</sup>

Perceiving no substantial substantive difference with respect to the error correction role between the Virginia model of discretionary review and some other appellate courts' summary affirmance procedure, commentators have questioned the efficacy of abandoning mandatory review in favor of discretionary review:

"[E]fforts to relieve heavily burdened courts by enacting legislation to convert an 'appeal of right' jurisdiction into a 'discretionary' jurisdiction may not be necessary or meaningful. The 'appeal of right' courts can accomplish the same result for themselves by adopting differentiated internal processes coupled with screening and staff research. ...

"What a litigant should get at the first level of review - whether his avenue of review be labeled as one of right or one in the court's discretion - is a procedure which preserves the essential elements of an appeal .... [T]o say that a party has a right to appeal means only that he has a right to put his case before a reviewing court and to get a decision on the merits, based on (a) communication to the court of the appellant's contentions, with supporting authority, as to why the trial

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Federal Judicial Improvements, The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth 34 (1989) (requiring courts of appeals to determine whether to grant leave to appeal "simply shift[s] the screening function now performed by most circuits to a nominally earlier stage in the appeal, without any improvement").

21. Appellate Courts, supra note 8, at 170.

judgment should not stand, and (b) enough of the facts and proceedings from the trial court to enable the appellate court to pass meaningfully on the contentions. How the contentions are communicated is not of the essence; whether in writing or orally is a detail of means on which there is surely room for choice by the court. How the court goes about considering and deciding the case is likewise a matter which does not go to the essence, so long as the judges give a meaningful consideration to the merits of the appellant's contentions. Thus, ... a 'discretionary' jurisdiction of the Virginia type accords a litigant what he is accorded by a review 'of right,' for example, in the Fifth Circuit [where, at the time, if three judges after examining the briefs and record unanimously agreed on the result, the appeal was summarily affirmed without oral argument in a short per curiam opinion]. In both, the litigant communicates the same information to the court, and he gets a decision on the merits."<sup>22</sup>

To be sure, some have advocated that appeal of right to federal circuit courts of appeals be replaced, at least in some areas, with discretionary review.<sup>23</sup> One obstacle among the

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22. Appellate Courts, supra note 8, at 170. See also J. Howard, Courts of Appeals in the Federal Judicial System 287-88 (1981) ("[U]nclear is how much judge-time certiorari procedures would save [in intermediate appellate courts]. The plain truth is that prisoner petitions, welfare claims, and the like get second-class treatment already. The overwhelming proportion are screened by staff and decided summarily. As the same personnel would probably assist judges in sorting cases for review, what would be gained by shifting from screening of mandatory appeals to selective docket control?").

23. See e.g., Lay, A Proposal for Discretionary Review in Federal Courts of Appeals, 34 Sw. L.J. 1151 (1981); Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62 (1985); J. Howard, Courts of Appeals in the Federal Judicial System 286-89 (1981) (reporting support among some

advocates is achieving consensus on the areas in which review should be discretionary.<sup>24</sup>

Among those who have proposed granting federal courts of appeals discretionary review is Judge Lay, chief judge of the eighth circuit. He has contended that procedures such as screening (where cases are selected for disposition without oral argument and, he states, "staff memorandum, written by first-year law clerks, are utilized as the court opinion in no-argument and even some argument cases")<sup>25</sup> and other case management techniques which lessen the full deliberative process "are, in reality, ... a form of discretionary dismissal

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federal circuit court of appeals judges for expanded discretionary docket control).

24. J. Howard, Courts of Appeals, supra note 23, at 287 ("There was little consensus on the fields in which discretionary jurisdiction should obtain. The chief contenders were diversity cases, administrative appeals involving fact finding by experts previously reviewed, and prisoner petitions .... If most circuit judges were ready to unload diversity cases, not many were willing to put administrators on a par with trial courts as factfinders to whom appellate courts should defer. Relieving grievances at their source was undoubtedly preferable to having circuit courts search for needles of reversible error or civil rights violations in haystacks of repetitious prisoner petitions. But because a few needles have pricked deep sores, some reeking of racism, many circuit judges were loath to choke off these remedies pending basic reforms of criminal processes"); Dalton, supra note 23, at 97-106 (tendering the suggestion that appeal of right may be intrinsically justified in criminal cases, suits against the government, class actions, and public law cases).

25. Lay, supra note 23, at 1153

without [being] call[ed] such."<sup>26</sup> He has proposed to maintain appeal of right for direct criminal appeals, but to permit courts of appeals "to refuse to review ... any [civil] appeal that on its face does not appear to be substantial or meritorious."<sup>27</sup> He feels that granting courts of appeals the

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26. Id., 1155.

27. Id., 1155. In further detail, he suggests as follows:

"In order to avoid denying review to meritorious cases, certain controls should be legislatively established guiding the courts of appeals' exercise of discretionary jurisdiction. I would propose guidelines that allow a court of appeals to deny review of only those cases that are patently frivolous or those in which the district court opinion appears on its face to be correct as a matter of law or fact. First, all defendants, whether appealing as indigents or not, would have a right to full review, including oral argument, in direct criminal appeals .... Second, each litigant seeking an appeal in any civil proceeding would be required to file a petition for discretionary review with the notice of appeal. The petitions would be limited to ten pages and would set forth the reasons the appeal should be allowed. Each petition would attach a copy of the district court's memorandum and judgment. Third, a three-judge panel would then review this petition within ten days of its filing. Any one circuit judge could grant the petition .... If the panel desires, it may request a response to the petition from the other side. Fourth, if the face of the petition presents any colorable issue of disputed law or presents a serious challenge to the sufficiency of the evidence, the appeal should be allowed. Fifth, a district court could certify that an appeal presents a colorable issue for



power to deny review in insubstantial cases would achieve the following benefits:

"First, the judicial time needed to review petitions for discretionary appeal would be no greater than that which is now spent on screening cases for no argument. Second, tremendous savings of judicial time and resources could be had by obviating the need for full review of lengthy briefs and records and the writing of formal opinions in hundreds of cases. Third, such procedures would tend to place the indigent's petition for review on the same evaluative basis as the appeal filed by the paid litigant. Fourth, the long delay between filing notice of appeal and the appellate decision would be drastically curtailed for all cases. Fifth, and most importantly, all cases worthy of appeal would be afforded the full deliberative process, including the right to oral argument and written opinion. The recommended procedure would actually provide more thoughtful judicial input into meritorious appeals than presently exists."<sup>28</sup>

Whether the advantages envisioned require the major step of abolishing appeals of right in order to be achieved is debatable. If lengthy briefs are a problem (how frequently a lengthy brief is filed in an insubstantial as opposed to a substantial case is unclear), then the solution may be initial screening to route the unpromising sounding appeals along an informal briefing track. Nor need formal opinions be written

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review; if such a certification is given, the parties could proceed without further permission from the court of appeals ....."

28. Id., 1157.

in all cases. Appropriate cases can be affirmed on the basis of the lower court opinion, or short per curiam or memorandum orders directed to the parties, but of no precedential value to others, can be utilized. The problem of indigent's inequality of resources far transcends the discretionary/appeal as of right debate and is unlikely to be resolved therein. And, as for processing time and preserving the court's resources for substantial and difficult appeals, whether that can be achieved demonstrably better through a discretionary system of review which preserves the error correction function than through screening functions courts have adopted under an appeal of right system remains to be proven.

**APPELLATE COURT CASELOADS:**

**A STATISTICAL OVERVIEW**

**By Vincent Flanagan**

**September 14, 1989\***

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**Vincent Flanagan is the Circuit Executive for the  
United States Courts for the First Circuit**

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## INTRODUCTION

The present situation in the federal courts of appeals presents an interesting statistical anomaly. On the one hand, the statistics show an incredible growth in the courts of appeals caseloads over the last several decades. For example, since 1945, filings in the courts of appeals have increased by 1,355%, from 2,730 filings in 1945 to 39,734 filings in 1989 (Table 1). Filings in the district courts during this same time period increased only by 178%, from 100,394 filings in 1945 to 279,288 filings in 1989 (Table 2). The dramatic growth in courts of appeals filings compared to district court filings is even more clearly demonstrated by what might be called the Rate of Appeal (Table 3). In 1989, one appeal was filed for every 8 district court terminations. By comparison, in 1945 one appeal was filed for every 42 district court terminations. These statistics demonstrate both the alarming growth in courts of appeals caseloads and the even more frightening possibility that courts of appeals caseloads may continue to grow in large numbers even if district court caseloads remain relatively stable or increase only slightly.

The other side of the statistical picture is the somewhat puzzlingly good news that the courts of appeals are relatively current in disposing of their caseloads, despite the overwhelming growth. The median time for the processing of an appeal decreased from 10.8 months in 1980 to 10.3 months in 1989 (Table 4), and the national inventory control index decreased from 11.6 months in 1980 to 9.6 months in 1989 (Table 5). There are also encouraging

indications that growth may be slowing. Since 1980, the courts of appeals filings have gone up 71%, from 23,200 to 39,734. This is a slower rate than existed prior to 1980 when filings were doubling or tripling every ten years (Table 1). Despite this good news, the courts of appeals combined pending caseload grew from 1,525 in 1945 to 30,006 in 1989, a 1,868% increase (Table 6).

The fact that the courts of appeals have been able to keep abreast of their growing caseloads should not be viewed as an indication that no problems exist in dealing with caseload growth or that the courts will be able to keep current in the future. The courts have been able to keep current by adopting various case management techniques such as the implementation of appellate court settlement programs, the elimination of oral argument in a large number of cases and the use of summary orders instead of written opinions to dispose of many cases. In addition, federal appellate judges have increased their per judge termination rate dramatically. In 1965, the average court of appeals judge participated in 136 merit based terminations each year, in 1989 that number rose to 382 (Table 7). The procedural reforms noted above and the increase in per judge workloads may have gone as far as they can in dealing with caseload increases. In addition, the reforms and increased per judge workloads carry with them some substantial costs to the federal judiciary. The traditional role of judges is, in the view of many commentators, being threatened by caseload pressures with the result that judges in the future may



be viewed more as bureaucrats in charge of large staffs, which would do most of the actual case review and decision making.

Looking at the raw numbers, although useful in developing a general picture of the volume of cases that must be dealt with by the courts of appeals today, is only the beginning of the process of examining the growth in the federal appellate judiciary. It is important to study specific growth patterns to try to discover why such dramatic growth has occurred. We must try to discover the reasons for the growth so that we will be able to more accurately predict future growth patterns, explore ways to control growth and develop a clear picture of the resources needed, including possible structural changes, to deal with anticipated growth.

#### Examining the Growth

Table 8 examines the growth in federal appellate filings by case type, comparing 1960 to 1989. As the table indicates, almost all caseload components have shown significant growth. The most dramatic growth has been in the filing of private prisoner petitions. Table 8 indicates that there were 111 private prisoner petitions filed in 1960 compared to 7,494 in 1989, an increase of 6,651%. Table 8 also shows the substantial growth in private civil appeals involving federal questions. There were 421 such appeals in 1960 compared to 8,782 in 1989, a 1,986% increase. Table 8 further indicates that prisoner petitions (private and U.S.) made up approximately 24% of the appellate caseload in 1989 compared to approximately 7% in 1960. The same type of growth as a percentage

of total caseload is apparent in the statistics on federal question appeals, which made up approximately 22% of the appellate caseload in 1989 compared to approximately 11% in 1960. Conversely, there has been a substantial decrease in the percent of the caseload attributable to administrative agency appeals, approximately 8% in 1989 compared to 19% in 1960, and diversity appeals, 11% in 1989 compared to 19% in 1960.

Tables 9 through 17 provide information on the Rate of Appeal by case type, comparing the rate in five year intervals from 1950 to 1989. Once again most caseload components show dramatic increases. In 1950, one in every 40 district court terminations resulted in an appeal compared to one in 8 in 1989. It is especially interesting to note that in 1950 only one out of every 121 district court criminal case terminations resulted in an appeal. The figure for 1989 is one in every 5. Also interesting to note is the fact that one in every two United States prisoner petition terminations results in an appeal and one in every five district court terminations of private prisoner petitions results in an appeal.

The figures contained in Tables 8 through 17 tend to indicate that the federal appellate caseloads are growing much more rapidly in certain areas than in others. The change in case mix in the district court toward more appeal prone cases, i.e. prisoner petitions, is one obvious reason for the increase. The large percent of prisoner petitions as a component of appellate caseloads may also help explain, in part, how the courts of appeals have been

able to deal with the overwhelming caseload increases. Prisoner petitions traditionally involve more staff than judge time, and therefore large increases in this category are more easily absorbed without a proportional number of judgeships being created.

The dramatic increase in the Rate of Appeal in criminal cases may be viewed as directly related to changes in the law allowing court appointed counsel to be more readily available to criminals seeking appellate review. The overall increase in the Rate of Appeal may be tied to a shrinkage in the cost of taking an appeal, compared to the large cost that must be incurred at the trial level. If appeals are relatively inexpensive procedures, it is logical to expect that parties who have already invested large sums of money in the trial court will be likely to risk a modest sum in pursuit of a favorable judgment on appeal. Another possible explanation of the increase in the Rate of Appeal could be tied to changes in the rate of reversal on appeal. However, as Table 18 demonstrates, the percent of cases reversed on appeal has decreased from approximately 28% in 1945 to approximately 13% in 1989.

Commentators have also suggested that the Rate of Appeal may be increasing because a larger percentage of appeals are now being pursued by entities concerned with making law regardless of the economic considerations of the cost of appellate review. Finally, it has been suggested that changes in finality requirements may have made it easier to appeal and that the creation of settlement programs may be encouraging parties to appeal in the hope of obtaining a settlement on the appellate level more favorable than

the district court judgment. (Most of the hypotheses discussed above were raised in a letter from Professor Maurice Rosenberg to Chief Judge Levin H. Campbell).

While some of the suggestions mentioned above as reasons for the increase in the Rate of Appeal are more feasible than others, all of them, and any others that are offered, should be carefully examined in order to develop a more complete understanding of the phenomenal growth in appeal caseloads. The validity of each hypothesis could have far reaching implications for both our ability to predict future growth and our understanding of the resources needed to deal with that growth. For example, if it is true that the Rate of Appeal has increased dramatically because of the relatively inexpensive nature of appellate review, then creating economic disincentives to appeal, such as strong fee shifting rules, may help slow the flow of appeals. On the other hand, if a significant portion of the growth in the Rate of Appeal is attributable to appeals by litigants mostly concerned with making law and little concerned with the economics of the process, then economic disincentives, unless extraordinarily Draconian, would have little impact on the Rate of Appeal. In addition, if we can predict that the growth in appellate caseloads will most likely continue to soar mainly in areas such as prisoner appeals, then our determination of the resources or structural changes need to deal with that part of the increase may become clear. In such instances increase in staff support, i.e. staff attorneys, or the

creation of a special avenue of review for prisoner cases may be a useful allocation of resources.

It is suggested that a committee be appointed consisting of a mix of judges, litigants, academics and statisticians to conduct a thorough study of the factors influencing both the raw growth in appellate caseloads and the phenomenal growth in the Rate of Appeal.

#### Forecasting Future Growth

Once a more complete understanding of past growth patterns is established, the knowledge gathered from that exercise should be used in developing forecasts for future growth. If it is clear that different case types can be expected to grow over time at different rates, then perhaps predictions of appellate caseload growth should be done by predicting the likelihood of growth in each case category and then adding the categories together to arrive at a forecast for overall growth. It may also be worthwhile to explore the development of a rate of appeal based on types of district court terminations, since certain types of terminations in the district courts are more likely to result in appeals than others. For example, if a study were to indicate that more district court cases were being disposed of without judicial action, i.e. settlements, than with judicial settlements, i.e. trials, then one could predict that the short term Rate of Appeal could be expected to decrease proportionately. Finally, it would appear to be worthwhile to carefully examine the recent slow down in the growth of appellate caseload to decide on how much weight



that should be given in predicting future growth. As suggested in the prior section, this project might benefit from the creation of a committee appointed for the specific task of developing a refined method for forecasting appellate caseloads.

#### Deciding on Future Resource Needs and Possible Structural Changes

Once hopefully accurate projections of expected future appellate caseloads are developed, estimates of the resources needed, including possible structural changes, to deal with the caseloads should be developed.

Discussion of resource needs can be divided into four main categories: judges, staff, case management programs and structural changes.

In order to determine the number of judgeships that will be needed to deal with projected caseload increases, two vital pieces of information must be gathered. One is a clear understanding of how much of the expected increase is likely to translate into a need for additional judgeships. The second is an estimate of how many cases a judge should be expected to participate in each year, without damaging the integrity of the judicial process.

At present, appellate filings, with the exception of a discounting factor applied to prisoner petitions, are all counted equally. The filing of a single party diversity appeal is considered equal to the filing of a major administrative agency appeal, for the purpose of evaluating judgeship needs. The same is not true for district courts, where a weighted caseload system is employed to measure the difficulty of cases as they relate to

the investment of judge time. It is strongly suggested that a weighted caseload system be developed for the courts of appeals. Such a system should help the judiciary to more accurately predict appellate judgeship needs and would eliminate the unfairness that now exists in the application of the present non-weighted standard among circuits, which have an undeniably widely varying degree of difficulty in the make-up of their caseloads. Table 19 demonstrates the differences in growth trends by case types among the circuits, as well as providing information on the 1989 composition of each circuits' caseload. Table 19 demonstrates the dramatic differences that exist among the circuits in the make-up of their caseloads.

In addition to developing a weighted caseload system significant consideration should be given to evaluating the number of cases an appellate judge can fairly be expected to participate in each year. Fortunately, this subject has been addressed by a group of distinguished scholars in the book "Justice on Appeal". Professors Carrington, Meador and Rosenberg suggest that a federal appellate judge should participate in not more than 225 decisions on the merits each year (75 cases per judge per year, assuming 3 judge panels). The authors believe that any more than this would "prevent the attainment of minimum standards of appellate justice". This issue has also been addressed by the United States Judicial Conference, which in reviewing requests from the circuits for additional judgeships use a standard of 255 case participations per judge per year (85 cases per judge per year assuming 3 judge

panels), weighing each prisoner petition as 1/2 of a case. Table 20 shows the judgeship requirements of the circuits based on 1989 data using the two standards discussed above. Tables 21 and 22 show the future judgeship needs of the circuits using the two standards in conjunction with caseload forecasts prepared by the Administrative Office of the United States Courts.

Table 20 reveals that all the circuits, with exception of the District of Columbia Circuit, are presently hearing significantly more cases per judgeship than suggested by the "Justice on Appeal" standard. Table 20 indicates that most circuits are also hearing significantly more cases per judge than suggested by the United States Judicial Conference standard. Table 20 also indicates that several circuits, especially the Fourth, Fifth, Sixth and Eleventh, are hearing a great many more cases per judge than the recommended standard. These statistics suggest either that judges may be extremely over worked, raising the possibility of endangerment to appellate justice or that the current standards may need to be reevaluated. The lack of a weighted caseload system makes these statistics hard to evaluate. Differences in case difficulty most probably explain the variance among circuits and to some degree the differences between the actual work being performed and the standards used to evaluate judgeship needs. However, it can be safely stated that the statistics do demonstrate the need for more judgeships even if they somewhat overstate the number of judgeships needed. As the information in Appendix B indicates, a comparison of federal appellate court workloads with the workloads in the nine

largest state intermediate appellate court systems demonstrates that federal appellate court judges are handling an excessively large workload per judge. Nevertheless a review of the standards discussed above should be undertaken in connection with the establishment of a weighted caseload system.

In evaluating the need for more legal staff support for judges, or the creation of new positions such as appellate magistrates, to handle the growing volume of cases, information must be gathered on the amount of judge time vs. staff time necessary to handle various types of cases. Table 23 attempts to provide such information but does so only marginally. It is, however, the clear impression of most people involved in the federal judicial system that certain types of cases can be handled mostly through staff work with only a small amount of judge time. This appears to be true for prisoner petitions and social security appeals, among others. A study should be undertaken to determine whether providing more legal staff support would enable the courts of appeals to effectively deal with increases in case types such as prisoner petitions and social security appeals. The study should also examine the value of establishing an appellate magistrate system or special tribunals to deal with these types of cases.

In the last two decades courts of appeals have responded to growing caseload pressures by implementing a variety of innovative case management techniques. Most circuits have established settlement programs, developed screening procedures to eliminate

cases from oral argument, implemented appeals expediting programs and adopted the practice of disposing of cases without published decisions. All of these procedures have been discussed at length in various law review articles, judicial administration journals and Federal Judicial Center studies (see for example: J.Cecil & D. Stienstra, *Deciding Cases Without Argument: A Description of Procedures in the Courts of Appeals*, 1985; D. Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals*, 1985; L. Farmer, *Appeals Expediting Systems: An Evaluation of Second and Eighth Circuit Procedures*, 1981; A. Partridge and A. Lind, *A Reevaluation of the Civil Appeals Management Plan*, 1983).

It is beyond the reach of this brief paper to evaluate in any detail the relative success of these procedures or the ability of these innovations to deal with the growing caseloads. Two facts do, however, clearly emerge from a review of the literature. The first one is that without the development of these innovative procedures, the courts of appeals could not have so successfully kept abreast of their growing caseloads. The second is that although there probably remains some small room for further benefits to be realized from these procedures, it is wrong to believe that these case management innovations, alone, will enable the courts to deal with their growing caseloads. These case management innovations have probably gone as far as can be expected in enabling the courts to control their burgeoning dockets. Without new resources, it would appear that pending caseloads will grow



beyond their already significant proportions. It should also be noted that none of the case management innovations mentioned above have been cost free. Much concern has been raised by the organized bar and other commentators over the possible excessive use of unpublished opinions, over unduly coercive settlement efforts and over the speed at which cases are pushed to argument. Although these criticisms have sometimes been nothing more than the natural resistance to change, they have at times raised valid points that bring into question any expanded use of such techniques as unpublished opinions, repetitive settlement conferences and expedited briefing schedules.

In addition, to the options of (1) finding ways to limit growth, (2) creating new judgeships and (3) enlarging legal staff support, there remains the possibility of structural changes as a solution to the growth problems of the courts of appeals. While the issue of structural change is being addressed separately by the Federal Courts Study Committee, I mention it to note that before structural change in any form is suggested, one should feel confident that fairly accurate predictions of growth exist. Unfortunately as indicated previously, I am not sure this is the case.

### Conclusion

Although a great deal of statistical information already exists in relation to the courts of appeals caseloads, there is still a large amount of information that needs to be gathered. It is suggested that a special committee be appointed to do so.

TABLE 1

## TOTAL APPELLATE FILINGS

YEAR	TOTAL FILINGS	PERCENT CHANGE	NUMBER OF JUDGESHIPS	FILINGS PER JUDGESHIP	PERCENT CHANGE
1945	2,730	n/a	59	46	n/a
1950	2,830	4%	65	44	-6%
1955	3,695	31%	65	57	31%
1960	3,899	6%	68	57	1%
1965	6,766	74%	78	87	51%
1970	11,662	72%	97	120	39%
1975	16,658	43%	97	172	43%
1980	23,200	39%	132	176	2%
1985	33,360	44%	132	253	44%
1989	39,734	19%	156	255	1%

FROM 1945 (2,730) TO 1989 (39,734) THERE WAS A 1,355% INCREASE IN APPEALS FILED.

FROM 1945 (46) TO 1989 (255) THERE WAS A 454% INCREASE IN FILINGS PER JUDGESHIP.

Table 2

## TOTAL DISTRICT COURT FILINGS

YEAR	TOTAL FILINGS	PERCENT CHANGE	NUMBER OF JUDGESHIPS	FILINGS PER JUDGESHIP	PERCENT CHANGE
1945	100,394	n/a	193	520	n/a
1950	92,342	-8%	215	429	-17%
1955	96,498	5%	244	395	-8%
1960	89,112	-8%	245	364	-8%
1965	71,012	-20%	307	231	-36%
1970	127,280	79%	401	317	37%
1975	160,602	26%	400	402	26%
1980	197,710	23%	516	383	-5%
1985	313,170	58%	575	545	42%
1989	279,288	-11%	575	486	-11%

FROM 1945 (100,394) TO 1989 (279,288) THERE WAS A 178% INCREASE IN CASES FILED IN THE DISTRICT COURTS.

FROM 1945 (520) TO 1989 (486) THERE WAS A 7% DECREASE IN FILINGS PER JUDGESHIP.

Table 3

RATE OF APPEAL NATIONAL FIGURES				
YEAR	TOTAL DISTRICT COURT TERMINATIONS	TOTAL APPEALS FILED FROM DISTRICT COURT TERMINATIONS	APPEALS AS A % OF TERMINATIONS	NUMBER OF DISTRICT COURT TERMINATIONS FOR EVERY 1 APPEAL FILED
1945	91,655	2,168	2.4%	42
1950	90,673	2,290	2.5%	40
1955	97,554	3,049	3.1%	32
1960	91,693	3,095	3.4%	30
1965	97,556	5,512	5.7%	18
1970	117,254	9,899	8.4%	12
1975	148,298	13,925	9.4%	11
1980	189,778	19,655	10.4%	10
1985	306,987	29,606	9.6%	10
1989	277,790	36,125	13.0%	8

Table 4

MEDIAN TIME INTERVALS IN CASES TERMINATED AFTER HEARING OR SUBMISSION  
FROM FILING NOTICE OF APPEAL TO FINAL DISPOSITION  
(MONTHS)

	1980	Number of Judges	1985	Number of Judges	1989	Number of Judges
DC	13.6	11	11.6	12	9.9	12
FIRST	7.6	4	7.8	6	9.8	6
SECOND	5.4	11	6.4	13	6.1	13
THIRD	9.4	10	8.7	12	5.9	12
FOURTH	12.9	10	9.3	11	8.1	11
FIFTH	11.6	26	9.8	16	8.9	16
SIXTH	18.6	11	12.7	15	10.5	15
SEVENTH	10.1	9	12.7	11	11.6	11
EIGHTH	7.3	9	8.3	10	9.6	10
NINTH	20.8	23	12.6	28	15.3	28
TENTH	14.8	8	13.9	10	18.7	10
ELEVENTH*			10.4	12	10.7	12
NATIONAL	10.8	132	10.3	156	10.3	156

Note: Comparable figures for 1965, 1970 and 1975 are not available.

\*The Court of Appeals for the Eleventh Circuit officially began operations on October 1, 1981.



Table 5

INVENTORY CONTROL INDEX												
	Number of Judges		Number of Judges		Number of Judges		Number of Judges		Number of Judges		Number of Judges	
	1965		1970		1975		1980		1985		1989	
DC	7.0	9	11.8	9	12.8	9	13.1	11	17.9	12	15.2	12
1ST	5.6	3	4.2	3	6.5	3	7.7	4	5.1	6	7.0	6
2ND	8.0	9	11.3	9	5.6	9	3.4	11	3.4	13	4.0	13
3RD	10.3	8	14.8	9	7.9	9	9.4	10	6.1	12	5.6	12
4TH	7.1	5	7.0	7	10.1	7	8.7	10	9.5	11	9.2	11
5TH	12.9	9	8.9	15	9.0	15	13.5	26	8.7	16	7.9	16
6TH	12.4	6	5.8	9	8.3	9	15.5	11	10.2	15	8.4	15
7TH	9.7	7	9.9	8	7.4	8	11.2	9	9.3	11	12.3	11
8TH	8.4	7	8.8	8	6.0	8	8.1	9	7.2	10	7.4	10
9TH	15.5	9	12.1	13	12.9	13	17.4	23	13.7	28	14.0	28
10TH	8.4	6	11.4	7	10.2	7	12.2	8	13.6	10	13.8	10
11TH									9.2	12	10.2	12
TOTAL	9.9	78	9.9	97	9.1	97	11.6	132	9.5	156	9.6	156

The inventory control index is calculated by dividing the total number of terminations in the measurement year by 12 to arrive at a monthly termination rate. The monthly termination rate is then divided into the number of pending cases reported at the close of the statistical year. The resulting index is a calculation of the number of months that it would take for a court to dispose of all its pending cases at the court's current termination rate. An increase in the index indicates that a court is falling behind in its work while a decrease in the index indicates that a court is becoming more current in its work.

Table 6

## COURTS OF APPEALS - PENDING CASES

YEAR	TOTAL PENDING CASES	NUMBER OF AUTHORIZED JUDGESHIPS	PENDING CASES PER JUDGESHIP
1945	1,525	59	26
1950	1,675	65	26
1955	2,175	65	33
1960	2,220	68	33
1965	4,775	78	61
1970	8,812	97	91
1975	12,128	97	125
1980	20,252	132	153
1985	24,758	156	159
1989	30,006	156	192

Table 7

## CASE PARTICIPATIONS IN TERMINATIONS ON THE MERITS PER JUDGESHIP

	1965	1970	1975	1980	1985	1989
DC	142	154	162	137	122	208
FIRST	115	162	241	272	282	377
SECOND	142	220	261	287	297	254
THIRD	91	108	248	245	347	373
FOURTH	160	148	231	258	424	497
FIFTH	207	289	449	272	372	461
SIXTH	150	221	261	296	352	479
SEVENTH	121	148	336	266	310	306
EIGHTH	85	117	213	199	380	420
NINTH	133	214	320	171	235	333
TENTH	135	190	174	324	273	381
ELEVENTH*					459	530
TOTAL	136	190	281	241	315	382

\*The Court of Appeals for the Eleventh Circuit officially began operations on October 1, 1981.

Table 8

## U.S. COURTS OF APPEALS - COMPOSITION OF FILINGS

	1960		1989		PERCENT CHANGE
	NUMBER	PERCENT	NUMBER	PERCENT	
CRIMINAL	623	16.0%	8,020	20.2%	1187%
U.S. CIVIL					
U.S. CIVIL (EXCLUDING PRISONER PETITIONS)	609	15.6%	4,284	10.8%	603%
U.S. PRISONER PETITIONS	179	4.6%	2,065	5.2%	1054%
PRIVATE CIVIL					
FEDERAL QUESTION (EXCLUDING PRISONER PETITIONS)	421	10.8%	8,782	22.1%	1986%
DIVERSITY OF CITIZENSHIP	740	19.0%	4,287	10.8%	479%
GENERAL LOCAL JURISDICTION (EXCLUDING PRISONER PETITIONS)	134	3.4%	63	0.2%	-53%
PRIVATE PRISONER PETITIONS	111	2.8%	7,494	18.9%	6651%
ADMIRALTY	128	3.3%	*		n/a
BANKRUPTCY	132	3.4%	1,130	2.8%	756%
ADMINISTRATIVE AGENCY	737	18.9%	2,965	7.5%	302%
ORIGINAL PROCEEDINGS	67	1.7%	644	1.6%	861%
ALL OTHER	18	0.5%	*		n/a
TOTAL	3,899	100.0%	39,734	100.0%	919%

\*CATEGORY DELETED FROM THE A.O. STATISTICAL REPORTS

Table 9

RATE OF APPEAL NATIONAL FIGURES				
YEAR	TOTAL DISTRICT COURT TERMINATIONS	TOTAL APPEALS FILED FROM DISTRICT COURT TERMINATIONS	APPEALS AS A % OF TERMINATIONS	NUMBER OF DISTRICT COURT TERMINATIONS FOR EVERY 1 APPEAL FILED
1950	90,673	2,290	2.5%	40
1955	97,554	3,049	3.1%	32
1960	91,693	3,095	3.4%	30
1965	97,556	5,512	5.7%	18
1970	117,254	9,899	8.4%	12
1975	148,298	13,925	9.4%	11
1980	189,778	19,655	10.4%	10
1985	306,987	29,606	9.6%	10
1989	277,790	36,125	13.0%	8



Table 10

RATE OF APPEAL  U.S. CASES (EXCLUDES PRISONER PETITIONS)				
YEAR	TOTAL DISTRICT COURT TERMINATIONS	TOTAL APPEALS FILED FROM DISTRICT COURT TERMINATIONS	APPEALS AS A % OF TERMINATIONS	NUMBER OF DISTRICT COURT TERMINATIONS FOR EVERY 1 APPEAL FILED
1950	20,618	492	2.4%	42
1955	19,519	652	3.3%	30
1960	17,680	609	3.4%	29
1965	17,563	965	5.5%	18
1970	18,908	1,349	7.1%	14
1975	22,109	2,101	9.5%	11
1980	51,737	3,647	7.0%	14
1985	115,450	5,234	4.5%	22
1989	61,569	4,284	7.0%	14

**NOTE:**

THE SIGNIFICANT INCREASE IN THE NUMBER OF DISTRICT COURT CASES TERMINATED BETWEEN 1980 AND 1985 IS ATTRIBUTED TO THE PHENOMENAL INCREASE IN THE NUMBER OF RECOVERY OF OVERPAYMENTS AND ENFORCEMENT OF JUDGMENTS CASES INITIATED BY THE FEDERAL GOVERNMENT AND SOCIAL SECURITY CASES, SPECIFICALLY CLAIMS FOR DISABILITY INSURANCE, FILED AGAINST THE FEDERAL GOVERNMENT. FROM 1980 TO 1985 THE NUMBER OF TERMINATIONS IN RECOVERY OF OVERPAYMENTS AND ENFORCEMENT OF JUDGMENTS CASES INCREASED 303%, FROM 13,417 TO 54,063. DURING THE SAME PERIOD OF TIME SOCIAL SECURITY CASES INCREASED 206%, FROM 9,584 TO 29,369.

Table 11

RATE OF APPEAL U.S. PRISONER PETITIONS				
YEAR	TOTAL DISTRICT COURT TERMINATIONS	TOTAL APPEALS FILED FROM DISTRICT COURT TERMINATIONS	APPEALS AS A % OF TERMINATIONS	NUMBER OF DISTRICT COURT TERMINATIONS FOR EVERY 1 APPEAL FILED
1950	779	216	27.7%	4
1955	837	159	19.0%	5
1960	977	179	18.3%	5
1965	2,562	422	16.5%	6
1970	3,963	818	20.6%	5
1975	4,883	880	18.0%	6
1980	3,883	1,007	25.9%	4
1985	4,818	1,510	31.3%	3
1989	4,995	2,065	41.3%	2

Table 12

RATE OF APPEAL PRIVATE CASES - FEDERAL QUESTION (EXCLUDES PRISONER PETITIONS)				
YEAR	TOTAL DISTRICT COURT TERMINATIONS	TOTAL APPEALS FILED FROM DISTRICT COURT TERMINATIONS	APPEALS AS A % OF TERMINATIONS	NUMBER OF DISTRICT COURT TERMINATIONS FOR EVERY 1 APPEAL FILED
1950	6,172	277	4.5%	22
1955	6,429	363	5.6%	18
1960	7,760	421	5.4%	18
1965	15,063	976	6.5%	15
1970	20,030	1,757	8.8%	11
1975	33,154	3,124	9.4%	11
1980	46,049	5,060	11.0%	9
1985	64,959	7,888	12.1%	8
1989	68,380	8,782	12.8%	8

Table 13

RATE OF APPEAL				
PRIVATE CASES - DIVERSITY OF CITIZENSHIP				
YEAR	TOTAL DISTRICT COURT TERMINATIONS	TOTAL APPEALS FILED FROM DISTRICT COURT TERMINATIONS	APPEALS AS A % OF TERMINATIONS	NUMBER OF DISTRICT COURT TERMINATIONS FOR EVERY 1 APPEAL FILED
1950	11,696	563	4.8%	21
1955	17,806	682	3.8%	26
1960	18,120	740	4.1%	24
1965	19,291	948	4.9%	20
1970	21,633	1,233	5.7%	18
1975	27,850	1,745	6.3%	16
1980	34,727	2,427	7.0%	14
1985	57,018	3,878	6.8%	15
1989	64,923	4,287	6.6%	15

## NOTE:

THERE WERE 68,224 DIVERSITY CASES FILED IN THE DISTRICT COURTS IN SY '88. THIS REPRESENTS 24% OF THE TOTAL CASELOAD OF THE DISTRICT COURTS. THE 4,504 DIVERSITY CASES FILED IN THE COURTS OF APPEALS IN SY '88 REPRESENT 12% OF TOTAL FILINGS. REMOVING DIVERSITY CASES FROM THE JURISDICTION OF THE FEDERAL COURTS WOULD HAVE A MUCH GREATER IMPACT ON THE WORKLOAD OF THE DISTRICT COURTS THAN IT WOULD HAVE ON THE WORKLOAD OF THE COURTS OF APPEALS.

Table 14

RATE OF APPEAL PRIVATE CASES - GENERAL LOCAL JURISDICTION (EXCLUDES PRISONER PETITIONS)				
YEAR	TOTAL DISTRICT COURT TERMINATIONS	TOTAL APPEALS FILED FROM DISTRICT COURT TERMINATIONS	APPEALS AS A % OF TERMINATIONS	NUMBER OF DISTRICT COURT TERMINATIONS FOR EVERY 1 APPEAL FILED
1950	*	152		
1955	*	151		
1960	*	134		
1965	3,726	148	4.0%	25
1970	4,155	201	4.8%	21
1975	2,685	84	3.1%	32
1980	1,025	38	3.7%	27
1985	522	39	7.5%	13
1989	664	63	9.5%	11

\*Figures are not available



Table 15

RATE OF APPEAL PRIVATE PRISONER PETITIONS				
YEAR	TOTAL DISTRICT COURT TERMINATIONS	TOTAL APPEALS FILED FROM DISTRICT COURT TERMINATIONS	APPEALS AS A % OF TERMINATIONS	NUMBER OF DISTRICT COURT TERMINATIONS FOR EVERY 1 APPEAL FILED
1950	642	70	10.9%	9
1955	668	70	10.5%	10
1960	868	111	12.8%	8
1965	4,932	605	12.3%	8
1970	10,777	1,643	15.2%	7
1975	13,106	1,558	11.9%	8
1980	17,564	2,675	15.2%	7
1985	25,842	5,022	19.4%	5
1989	34,556	7,494	21.7%	5

Table 16

RATE OF APPEAL BANKRUPTCY CASES				
YEAR	TOTAL DISTRICT COURT TERMINATIONS	TOTAL APPEALS FILED FROM DISTRICT COURT TERMINATIONS	APPEALS AS A % OF TERMINATIONS	NUMBER OF DISTRICT COURT TERMINATIONS FOR EVERY 1 APPEAL FILED
1950	25,582	122	0.5%	210
1955	52,240	153	0.3%	341
1960	99,317	132	0.1%	752
1965	175,117	217	0.1%	807
1970	182,430	205	0.1%	890
1975	192,792	246	0.1%	784
1980	162,509	396	0.2%	410
1985	333,158	1,046	0.3%	319
1989	577,848	1,130	0.2%	511

Table 17

RATE OF APPEAL CRIMINAL CASES				
YEAR	TOTAL DISTRICT COURT TERMINATIONS	TOTAL APPEALS FILED FROM DISTRICT COURT TERMINATIONS	APPEALS AS A % OF TERMINATIONS	NUMBER OF DISTRICT COURT TERMINATIONS FOR EVERY 1 APPEAL FILED
1950	37,414	308	0.8%	121
1955	38,580	677	1.8%	57
1960	29,864	623	2.1%	48
1965	32,078	1,223	3.8%	26
1970	36,819	2,660	7.2%	14
1975	43,515	4,187	9.6%	10
1980	29,297	4,405	15.0%	7
1985	37,139	4,989	13.4%	7
1989	42,810	8,020	18.7%	5

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Table 18

## PERCENT OF CASES REVERSED BY CASE TYPE

CASETYPE	1945	1950	1955	1960	1965	1970	1975	1980	1985	1989
CRIMINAL	18.6	15.9	26.1	17.7	16.9	16.6	11.8	11.2	8.6	9.3
U.S. CIVIL	32.1	25.4	26.5	24.9	22.1	23.0	22.3	19.6		
U.S. PRISONER PETITIONS									8.1	5.4
OTHER U.S. CIVIL									25.1	19.8
PRIVATE CIVIL	32.1	21.8	26.3	26.5	25.1	24.2	19.9	18.6		
PRIV. PRISONER PETITIONS									13.6	9.7
OTHER PRIVATE CIVIL									18.0	16.1
BANKRUPTCY	28.3	29.1	29.1	29.7	24.8	21.6	19.9	19.1	18.3	19.1
ADMINISTRATIVE APPEALS	21.3	20.7	28.7	25.2	19.4	15.5	21.5	22.4	11.2	13.6
TOTAL	27.9	22.4	26.9	24.5	22.0	20.9	17.8	17.4	15.9	13.3

Note: Beginning in 1985 the U.S. Civil category was divided into two separate categories: U.S. Prisoner Petitions and Other U.S. Civil.  
The Private Civil category was also divided into two separate categories: Private Prisoner Petitions and Other Private Civil.



Table 19

## GROWTH TREND BY CASE TYPE

	1982	1983	1984	1985	1986	1987	1988	1989	1989 PERCENT*
<b>ALL CIRCUITS</b>	<b>27946</b>	<b>29630</b>	<b>31490</b>	<b>33360</b>	<b>34292</b>	<b>35176</b>	<b>37524</b>	<b>39734</b>	
CRIMINAL	4767	4790	4881	4989	5134	5260	6012	8020	20%
U.S. PRISONER PETITIONS	1203	1258	1397	1510	1569	1802	1962	2065	5%
OTHER U.S. CIVIL	4314	4562	4862	5234	4846	4490	4248	4284	11%
PRIVATE PRISONER PETITIONS	3631	4069	4567	5022	5423	6686	7294	7494	19%
OTHER PRIVATE CIVIL	9636	10360	10899	11805	12453	12560	13170	13132	33%
BANKRUPTCY	509	688	987	1046	977	1040	1153	1130	3%
ADMINISTRATIVE APPEALS	3118	3069	3045	3179	3187	2723	3043	2965	7%
ORIGINAL PROCEEDINGS	768	834	852	575	703	615	642	644	2%
<b>DISTRICT OF COLUMBIA</b>	<b>1447</b>	<b>1562</b>	<b>1337</b>	<b>2114</b>	<b>1871</b>	<b>1583</b>	<b>1925</b>	<b>1771</b>	
CRIMINAL	111	74	62	78	92	84	140	182	10%
U.S. PRISONER PETITIONS	48	35	37	47	72	67	78	77	4%
OTHER U.S. CIVIL	554	435	354	712	475	438	323	335	19%
PRIVATE PRISONER PETITIONS	9	30	18	39	29	28	38	49	3%
OTHER PRIVATE CIVIL	185	262	233	395	265	251	244	231	13%
BANKRUPTCY	5	6	26	24	10	5	2	1	0%
ADMINISTRATIVE APPEALS	504	672	563	773	896	678	1066	868	49%
ORIGINAL PROCEEDINGS	31	48	44	46	32	32	34	28	2%
<b>FIRST CIRCUIT</b>	<b>1040</b>	<b>936</b>	<b>1050</b>	<b>1051</b>	<b>1186</b>	<b>1110</b>	<b>1239</b>	<b>1287</b>	
CRIMINAL	163	164	186	207	224	220	302	272	21%
U.S. PRISONER PETITIONS	12	24	28	19	6	23	24	36	3%
OTHER U.S. CIVIL	192	230	330	203	247	224	209	191	15%
PRIVATE PRISONER PETITIONS	61	52	44	69	62	76	76	85	7%
OTHER PRIVATE CIVIL	475	355	378	452	551	492	540	591	46%
BANKRUPTCY	27	21	27	38	23	21	19	29	2%
ADMINISTRATIVE APPEALS	89	68	44	46	55	39	60	52	4%
ORIGINAL PROCEEDINGS	21	22	13	17	18	15	9	31	2%
<b>SECOND CIRCUIT</b>	<b>2827</b>	<b>2731</b>	<b>2945</b>	<b>2844</b>	<b>2932</b>	<b>3008</b>	<b>2942</b>	<b>3172</b>	
CRIMINAL	515	500	474	490	579	544	539	669	21%
U.S. PRISONER PETITIONS	102	95	113	112	80	128	97	86	3%
OTHER U.S. CIVIL	333	396	411	369	404	385	312	355	11%
PRIVATE PRISONER PETITIONS	370	309	368	351	382	456	532	508	16%
OTHER PRIVATE CIVIL	1068	1052	1175	1133	1155	1192	1188	1290	41%
BANKRUPTCY	56	62	102	148	95	65	65	51	2%
ADMINISTRATIVE APPEALS	287	230	210	205	201	199	180	172	5%
ORIGINAL PROCEEDINGS	96	87	92	36	36	39	29	41	1%
<b>THIRD CIRCUIT</b>	<b>2191</b>	<b>2513</b>	<b>2506</b>	<b>2499</b>	<b>2468</b>	<b>2595</b>	<b>2933</b>	<b>3088</b>	
CRIMINAL	341	429	319	371	296	395	410	490	16%
U.S. PRISONER PETITIONS	103	116	123	124	127	164	144	162	5%
OTHER U.S. CIVIL	293	284	354	440	351	272	262	227	7%
PRIVATE PRISONER PETITIONS	247	346	352	377	448	403	654	649	21%
OTHER PRIVATE CIVIL	866	989	989	924	969	1040	1182	1248	40%
BANKRUPTCY	33	76	64	53	65	91	77	90	3%
ADMINISTRATIVE APPEALS	253	201	244	186	184	201	160	191	6%
ORIGINAL PROCEEDINGS	55	72	61	24	28	29	44	31	1%

Table 19

## GROWTH TREND BY CASE TYPE

	1982	1983	1984	1985	1986	1987	1988	1989	1989 PERCENT*
<b>FOURTH CIRCUIT</b>	<b>2651</b>	<b>2411</b>	<b>2338</b>	<b>2747</b>	<b>2799</b>	<b>2886</b>	<b>3203</b>	<b>3287</b>	
CRIMINAL	412	330	362	365	404	348	423	521	16%
U.S. PRISONER PETITIONS	142	145	125	108	139	190	267	242	7%
OTHER U.S. CIVIL	326	326	280	296	306	304	295	291	9%
PRIVATE PRISONER PETITIONS	855	700	548	886	765	900	899	933	28%
OTHER PRIVATE CIVIL	655	639	743	834	879	890	882	926	28%
BANKRUPTCY	35	55	69	67	86	88	225	125	4%
ADMINISTRATIVE APPEALS	173	170	166	174	195	144	185	222	7%
ORIGINAL PROCEEDINGS	53	46	45	17	25	22	27	27	1%
<b>FIFTH CIRCUIT</b>	<b>2715</b>	<b>3193</b>	<b>3612</b>	<b>3456</b>	<b>3837</b>	<b>4301</b>	<b>4331</b>	<b>4759</b>	
CRIMINAL	345	406	432	388	501	503	636	984	21%
U.S. PRISONER PETITIONS	63	55	83	77	84	98	116	157	3%
OTHER U.S. CIVIL	352	332	316	343	317	338	333	433	9%
PRIVATE PRISONER PETITIONS	275	587	788	672	766	1120	1102	988	21%
OTHER PRIVATE CIVIL	1282	1397	1501	1614	1681	1769	1672	1800	38%
BANKRUPTCY	40	79	84	66	111	147	135	119	3%
ADMINISTRATIVE APPEALS	281	261	290	217	272	249	269	186	4%
ORIGINAL PROCEEDINGS	77	76	118	79	105	77	68	92	2%
<b>SIXTH CIRCUIT</b>	<b>2599</b>	<b>2824</b>	<b>2995</b>	<b>3176</b>	<b>3618</b>	<b>3817</b>	<b>3831</b>	<b>4195</b>	
CRIMINAL	353	382	405	386	396	437	439	676	16%
U.S. PRISONER PETITIONS	122	120	132	131	176	182	172	197	5%
OTHER U.S. CIVIL	416	416	574	507	597	532	533	474	11%
PRIVATE PRISONER PETITIONS	442	470	439	612	779	954	895	1004	24%
OTHER PRIVATE CIVIL	932	1050	1049	1101	1289	1320	1428	1403	33%
BANKRUPTCY	51	66	99	94	80	86	63	87	2%
ADMINISTRATIVE APPEALS	262	287	268	305	268	268	278	315	8%
ORIGINAL PROCEEDINGS	21	33	29	40	33	38	23	39	1%
<b>SEVENTH CIRCUIT</b>	<b>2150</b>	<b>2335</b>	<b>2254</b>	<b>2265</b>	<b>2278</b>	<b>2173</b>	<b>2409</b>	<b>2703</b>	
CRIMINAL	294	347	337	337	310	297	396	491	18%
U.S. PRISONER PETITIONS	222	196	232	250	214	172	240	225	8%
OTHER U.S. CIVIL	253	289	265	265	216	201	157	187	7%
PRIVATE PRISONER PETITIONS	336	385	359	312	328	448	514	581	21%
OTHER PRIVATE CIVIL	715	855	793	776	939	805	856	932	34%
BANKRUPTCY	46	62	58	96	74	72	64	83	3%
ADMINISTRATIVE APPEALS	250	170	186	196	174	152	145	176	7%
ORIGINAL PROCEEDINGS	34	31	24	33	23	26	37	28	1%
<b>EIGHTH CIRCUIT</b>	<b>1596</b>	<b>1697</b>	<b>1838</b>	<b>2018</b>	<b>2053</b>	<b>2209</b>	<b>2387</b>	<b>2677</b>	
CRIMINAL	276	275	272	268	269	312	305	524	20%
U.S. PRISONER PETITIONS	90	107	86	112	129	179	234	239	9%
OTHER U.S. CIVIL	262	294	282	340	309	284	348	340	13%
PRIVATE PRISONER PETITIONS	188	153	240	330	389	502	581	647	24%
OTHER PRIVATE CIVIL	589	663	729	765	746	758	682	727	27%
BANKRUPTCY	35	40	65	65	67	86	94	63	2%
ADMINISTRATIVE APPEALS	114	108	107	100	96	61	111	101	4%
ORIGINAL PROCEEDINGS	42	57	57	38	48	27	32	36	1%

Table 19

## GROWTH TREND BY CASE TYPE

	1982	1983	1984	1985	1986	1987	1988	1989	1989 PERCENT*
<b>NINTH CIRCUIT</b>	<b>4390</b>	<b>4583</b>	<b>5204</b>	<b>5303</b>	<b>5291</b>	<b>5652</b>	<b>6334</b>	<b>6305</b>	
CRIMINAL	813	764	855	889	911	974	1148	1553	25%
U.S. PRISONER PETITIONS	127	128	147	145	200	246	247	275	4%
OTHER U.S. CIVIL	713	835	966	976	853	859	866	861	14%
PRIVATE PRISONER PETITIONS	416	321	461	425	454	649	766	820	13%
OTHER PRIVATE CIVIL	1374	1520	1614	1823	1933	2062	2544	1941	31%
BANKRUPTCY	86	98	203	209	165	209	208	272	4%
ADMINISTRATIVE APPEALS	638	648	718	720	615	511	368	433	7%
ORIGINAL PROCEEDINGS	223	269	240	116	160	142	187	150	2%
<b>TENTH CIRCUIT</b>	<b>1784</b>	<b>1767</b>	<b>1922</b>	<b>1964</b>	<b>2030</b>	<b>1967</b>	<b>2066</b>	<b>2144</b>	
CRIMINAL	316	232	287	279	243	261	260	390	18%
U.S. PRISONER PETITIONS	124	146	121	127	143	116	149	120	6%
OTHER U.S. CIVIL	291	283	306	260	273	231	226	222	10%
PRIVATE PRISONER PETITIONS	207	253	241	237	296	320	358	363	17%
OTHER PRIVATE CIVIL	599	643	683	792	760	777	775	789	37%
BANKRUPTCY	54	50	69	85	68	62	95	95	4%
ADMINISTRATIVE APPEALS	122	106	145	114	114	97	110	100	5%
ORIGINAL PROCEEDINGS	71	54	70	70	133	103	93	65	3%
<b>ELEVENTH CIRCUIT</b>	<b>2556</b>	<b>3078</b>	<b>3489</b>	<b>3923</b>	<b>3929</b>	<b>3875</b>	<b>3924</b>	<b>4346</b>	
CRIMINAL	828	887	890	931	909	885	1014	1268	29%
U.S. PRISONER PETITIONS	48	91	170	258	199	237	194	249	6%
OTHER U.S. CIVIL	329	442	424	523	498	422	384	368	8%
PRIVATE PRISONER PETITIONS	225	463	709	712	725	830	879	867	20%
OTHER PRIVATE CIVIL	896	935	1012	1196	1286	1204	1177	1254	29%
BANKRUPTCY	41	73	121	101	133	108	106	115	3%
ADMINISTRATIVE APPEALS	145	148	104	143	117	124	111	149	3%
ORIGINAL PROCEEDINGS	44	39	59	59	62	65	59	76	2%

\*Due to rounding, percents may not add up to 100%

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Table 20

## JUDGESHIP REQUIREMENTS OF THE CIRCUITS

(Based on 1989 Data)

Circuit	Terminations on the Merits	Authorized Judgeships	Terminations Per Authorized Judgeship	Total Judgeships Needed Under 75- Case-a-Year Standard (1)	Number of New Judges Needed to Meet Standard	Total Judgeships Needed Under 85- Case-a-Year Standard (2)	Number of New Judges Needed to Meet Standard
DC	803	12	67	13	1	9	-3
FIRST	747	6	125	9	3	9	3
SECOND	1100	13	85	15	2	12	-1
THIRD	1481	12	123	21	9	16	4
FOURTH	1794	11	163	26	15	17	6
FIFTH	2441	16	153	32	16	26	10
SIXTH	2369	15	158	32	17	24	9
SEVENTH	1097	11	100	16	5	12	1
EIGHTH	1370	10	137	16	6	14	4
NINTH	2794	28	100	36	8	31	3
TENTH	1228	10	123	17	7	13	3
ELEVENTH	2098	12	175	28	16	23	11
TOTAL	19322	156	124	261	105	206	50

(1) This standard is set forth in the book entitled "Justice on Appeal" by Paul Carrington, Daniel Meador and Maurice Rosenberg.

(2) This standard is the current "rule of thumb" used by the Administrative Office of the United States Courts in assisting the United States Judicial Conference in establishing judgeship needs. Under this method prisoner petitions terminated on the merits count as one-half a case.

Note: There is a judgeship bill under consideration by congressional committee that requests 2 judges for the Third Circuit, 4 judges for the Fourth Circuit, 1 judge for the Fifth Circuit, 2 judges for the Eighth Circuit, and 2 judges for the Tenth Circuit.



Table 21

## JUDGESHIP FORECASTS\*

	DC	1ST	2ND	3RD	4TH	5TH	6TH	7TH	8TH	9TH	10TH	11TH	TOTAL
<b>Forecast #1**</b>													
5 Years	13	12	19	24	31	40	36	21	24	50	21	36	327
10 Years	14	13	21	27	35	45	41	24	28	57	23	41	369
20 Years	17	16	26	34	44	56	51	30	34	70	29	50	457
<b>Forecast #2**</b>													
5 Years	12	12	19	25	31	41	38	22	25	52	21	37	335
10 Years	13	14	22	28	36	48	44	25	30	60	24	43	387
20 Years	16	18	26	35	45	62	56	32	38	77	30	55	490
<b>Forecast #3**</b>													
5 Years	13	15	21	28	36	52	47	25	31	64	24	45	401
10 Years	14	23	26	37	47	78	69	34	46	93	32	66	565
20 Years	18	51	39	64	81	174	152	62	100	199	55	142	1137
<b>Forecast #4**</b>													
5 Years	14	15	22	32	43	56	49	27	32	69	27	49	435
10 Years	17	21	30	47	69	92	77	39	48	110	39	78	667
20 Years	27	43	52	105	175	243	188	79	110	280	83	195	1580

\*The judgeship forecasts are based upon the projected filing figures provided by the Administrative Office of the United States Courts and on the standard of 75 terminations on the merits per judgeship as set forth in the book entitled "Justice of Appeal" by Paul Carrington, Daniel Meador and Maurice Rosenberg.

\*\*For a definition of forecast numbers one through four see attached letter.

Table 22

## JUDGESHIP FORECASTS\*

	DC	1ST	2ND	3RD	4TH	5TH	6TH	7TH	8TH	9TH	10TH	11TH	TOTAL
<b>Forecast #1**</b>													
5 Years	12	9	16	21	27	34	31	18	21	43	17	31	280
10 Years	12	11	18	23	30	39	35	20	23	49	20	35	315
20 Years	14	13	22	29	38	49	44	25	29	61	25	43	392
<b>Forecast #2**</b>													
5 Years	12	10	16	21	27	36	32	18	21	45	18	32	288
10 Years	12	12	18	24	31	42	38	21	25	52	20	37	332
20 Years	13	15	22	30	39	54	49	27	33	67	26	48	423
<b>Forecast #3**</b>													
5 Years	12	13	17	24	30	45	40	21	27	55	20	39	343
10 Years	12	19	22	32	40	68	60	29	40	81	27	58	488
20 Years	15	44	34	56	70	153	133	54	88	175	48	124	994
<b>Forecast #4**</b>													
5 Years	12	12	19	27	37	49	43	23	27	60	23	43	375
10 Years	14	18	25	41	60	80	67	33	42	96	33	68	577
20 Years	23	37	45	92	153	214	165	69	96	246	73	171	1384

\*The judgeship forecasts are based upon the projected filing figures provided by the Administrative Office of the United States Courts and on the standard of 85 terminations on the merits per judgeship which is the "rule of thumb" currently used by the Administrative Office and the Judicial Conference to establish judgeship needs.

\*\*For a definition of forecast numbers one through four see attached letter.

Table 23

## CASES TERMINATED BY CASETYPE - 1989

CASETYPE	TOTAL TERMINATIONS	CASES DISPOSED OF BY CONSOLIDATION		PROCEDURAL TERMINATIONS BY STAFF		PROCEDURAL TERMINATIONS BY JUDGE		TERMINATIONS ON THE MERITS	
	Number	Number	Percent*	Number	Percent*	Number	Percent*	Number	Percent*
CRIMINAL	6,297	634	10%	924	15%	753	12%	3,986	63%
U.S. PRISONER PETITIONS	1,937	56	3%	445	23%	361	19%	1,075	55%
OTHER U.S. CIVIL	4,190	252	6%	1,086	26%	461	11%	2,391	57%
PRIV. PRISONER PETITIONS	6,884	160	2%	1,252	18%	2,353	34%	3,119	45%
OTHER PRIVATE CIVIL	13,429	1,246	9%	3,879	29%	1,858	14%	6,446	48%
BANKRUPTCY	1,105	176	16%	318	29%	150	14%	461	42%
ADMINISTRATIVE APPEALS	2,914	405	14%	779	27%	427	15%	1,303	45%
ORIGINAL PROCEEDINGS	616	2	0%	40	6%	33	5%	541	88%
TOTAL	37,372	2,931	8%	8,723	23%	6,396	17%	19,322	52%

\*All percents may not add up to 100 due to rounding.

Table 24

## PERCENT OF APPEALS DISPOSED OF AFTER ORAL HEARING VERSUS SUBMISSION ON THE BRIEFS

CIRCUIT	1975		1980		1985		1989	
	ORAL	SUB.	ORAL	SUB.	ORAL	SUB.	ORAL	SUB.
DC	78.3	21.7	90.9	9.1	91.0	9.0	53.7	46.3
1st	70.6	29.4	64.0	36.0	68.3	31.7	67.6	32.4
2nd	91.8	8.2	84.1	15.9	77.1	22.9	80.2	19.8
3rd	56.4	43.6	48.5	51.5	43.3	56.7	33.0	67.0
4th	82.5	17.5	95.2	4.8	45.2	54.8	39.3	60.7
5th	43.0	57.0	58.4	41.6	42.7	57.3	33.2	66.8
6th	86.4	13.6	71.1	28.9	67.0	33.0	49.6	50.4
7th	90.1	9.9	87.6	12.4	64.3	35.7	69.6	30.4
8th	82.7	17.3	65.7	34.3	56.1	43.9	55.7	44.3
9th	60.2	39.8	79.3	20.7	60.5	39.5	60.8	39.2
10th	83.6	16.4	62.3	37.7	47.6	52.4	45.0	55.0
11th*					48.6	51.4	45.5	54.5
NATIONAL	69.7	30.3	71.4	28.6	56.5	43.5	50.4	49.6

Note: The A.O. did not publish these statistics prior to 1975

\*The Court of Appeals for the Eleventh Circuit officially began operations on October 1, 1981.

L. RALPH MECHAM  
DIRECTOR

JAMES E. MACKLIN, JR.  
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

WASHINGTON, D.C. 20544

DAVID L. COOK  
CHIEF STATISTICAL ANALYSIS  
AND REPORTS DIVISION  
FTS 633-6094  
202-633-6094

July 20, 1989

Mr. Denis Hauptly  
U.S. Claims Court  
1444 I Street, N.W., 10th Floor  
Washington, DC 20005

Dear Denis:

Attached are the forecasts you requested for the Structure Subcommittee of the Federal Courts Study Committee. There are four forecasts for each of the Circuit Courts of Appeals for five, ten and 20 years ahead. The object of this was to generate low, moderate, and high forecasts.

The historical data for the 5th and 11th Circuits is estimated. The judgeship forecasts are based on the current "rule of thumb" of 255 merits terminations per judgeship, where prisoner appeals count as one-half a case. The "Judgeship Percentage" row in the table gives the proportion of filings over the last five years which end up as merits terminations. Since the Courts of Appeals have been reluctant historically to request judgeships (and Congress slow to authorize them), the judgeship forecasts are not predictions of actual authorized judgeships in the future. They represent instead the number of judgeships which would be supported by the predicted workload based on the 255 merits terminations rule.

Forecast #1 is intended to underestimate future filing levels. It extends out the numerical increase from 1960 to 1989. For example, the First Circuit went from 154 filings in 1960 to 1292 in 1989, an average increase of 39.6 filings per year. The forecasts assume the same average increase for the next five, ten, and 20 years.

Forecast #2 is probably the most realistic, although #3 is not unreasonable. Number 2 is the same as #1, except it uses 1970 for the base year instead of 1960. (Filings nationwide have increased in a fairly straight line since 1970, so this base year is more appropriate. They have not gone up in a straight line since 1960, however.)

Forecast #3 is a high version of a likely scenario. It uses the average annual percent increase from 1970 to 1989 and assumes that will continue increasing for five, ten and 20 years.



Mr. Denis Hauptly  
July 20, 1989  
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Forecast #4 is intentionally high. It is the same as number #3 but uses 1960 as a base year instead of 1970.

I've excluded a lot of details in deliberately trying to keep this letter brief. Please don't hesitate to contact me at FTS 633-6010 if you need a fuller explanation.

Sincerely,

A handwritten signature in dark ink, appearing to read "Steve", with a long horizontal line extending to the right.

Steven C. Suddaby  
Statistician

cc: David L. Cook

# FIVE, TEN, AND TWENTY YEAR FORECASTS

## BY CIRCUIT:

### APPEALS FILINGS AND CIRCUIT COURTS OF APPEALS JUDGESHIPS

Circuit:	DC	1ST	2ND	3RD	4TH	5TH	6TH	7TH	8TH	9TH	10TH	11TH	TOTAL
<b>Filings:</b>													
1960	505	154	582	296	224	277	306	329	237	455	234	300	3899
1970	1127	277	1343	1053	1166	1003	911	854	589	1585	743	1011	11662
1989 (March)	1764	1292	3020	3017	3281	4606	4018	2646	2560	6658	2142	4235	39239
<b>Forecast #1</b>													
5 Years	1994	1500	3465	3514	3839	5397	4696	3069	2984	7791	2490	4954	45692
10 Years	2213	1698	3889	3987	4371	6149	5341	3472	3388	8870	2822	5638	51838
20 Years	2651	2094	4737	4934	5434	7655	6633	4278	4196	11027	3486	7007	64131
<b>Forecast #2</b>													
5 Years	1942	1576	3490	3567	3873	5615	4888	3148	3112	8078	2534	5138	46961
10 Years	2112	1847	3937	4091	4437	6576	5716	3626	3637	9431	2907	5997	54314
20 Years	2452	2368	4831	5138	5565	8497	7374	4581	4689	12137	3653	7717	69022
<b>Forecast #3</b>													
5 Years	2000	1988	3789	4051	4383	7058	6088	3632	3863	9951	2881	6325	56010
10 Years	2254	2998	4703	5364	5776	10598	9043	4910	5716	14591	3821	9267	79041
20 Years	2862	6816	7246	9404	10029	23895	19955	8975	12515	31371	6721	19894	159682
<b>Forecast #4</b>													
5 Years	2217	1905	4079	4610	5357	7696	6430	3872	3953	10868	3209	6868	61064
10 Years	2755	2758	5432	6903	8543	12548	10062	5564	5980	17330	4717	10883	93477
20 Years	4257	5780	9631	15480	21732	33360	24642	11490	13683	44070	10189	27332	221644
<b>Judgeship</b>													
Percentage:	.461	.556	.403	.508	.601	.546	.570	.513	.599	.475	.610	.533	
<b>JUDGESHIP FORECASTS</b>													
<b>Forecast #1</b>													
5 Years	12	9	16	21	27	34	31	18	21	43	17	31	280
10 Years	12	11	18	23	30	39	35	20	23	49	20	35	315
20 Years	14	13	22	29	38	49	44	25	29	61	25	43	392
<b>Forecast #2</b>													
5 Years	12	10	16	21	27	36	32	18	21	45	18	32	288
10 Years	12	12	18	24	31	42	38	21	25	52	20	37	332
20 Years	13	15	22	30	39	54	49	27	33	67	26	48	423
<b>Forecast #3</b>													
5 Years	12	13	17	24	30	45	40	21	27	55	20	39	343
10 Years	12	19	22	32	40	68	60	29	40	81	27	58	488
20 Years	15	44	34	56	70	153	133	54	88	175	48	124	994
<b>Forecast #4</b>													
5 Years	12	12	19	27	37	49	43	23	27	60	23	43	375
10 Years	14	18	25	41	60	80	67	33	42	96	33	68	577
20 Years	23	37	45	92	153	214	165	69	96	246	73	171	1384

Notes: 1960 and 1970 filings for 5th and 11th Circuits are estimates.

Five, 10, & 20 year forecasts are for years ended June 30, 1994, 1999, and 2009.

The methods used in forecasts #1 through #4 are explained in the accompanying memo.

**Intercircuit Conflicts:**  
**An Overview**

by

Jeffrey Barr\*

---

\*Jeffrey Barr is the Supervisory Staff Attorney at the First Circuit Court of Appeals. He has also worked as a law clerk to a federal court of appeals judge and as an attorney at the Boston law firm of Foley, Hoag & Eliot.

NOTE

The attached paper is a preliminary draft for distribution to members of the appellate structure subcommittee. Comments on the preliminary draft are welcome and will be incorporated into a final version for distribution to the entire committee.

We have just received a short paper from the Maritime Law Association of the United States entitled "Conflicts Among the Circuits in Maritime Cases." The findings of this paper will be reflected in the final draft.

Jeffrey Barr

Commentators have disagreed widely on the numerical proportions of the problem of intercourt conflicts. Their estimates of the number of unresolved intercourt conflicts per year presented in petitions for certiorari range from 16 to 67, a dramatic difference. It would appear that further work is needed to determine which numbers are accurate. Equally important, none of the commentators, with one exception, go beyond mere numbers to develop criteria for making judgments as to which unresolved intercourt conflicts should be thought intolerable, and then to apply those criteria to ascertain the qualitative dimensions of the conflicts problem. A fully reasoned judgment about the seriousness of the problem cannot be made until this is done. In the meantime, such work as has been done does tend to support the proposition that the conflicts problem is substantial enough to justify structural change.

1. The Number of Intercircuit Conflicts. The oldest source in this area is the report of the Hruska Commission, submitted in 1975, which contains a study of intercourt conflicts done by Floyd Feeney. 67 F.R.D. 195, 298. Feeney examined petitions for certiorari filed during the 1971 and 1972 Supreme Court terms and identified unresolved conflicts between lower federal and state courts, classifying them as direct conflicts, strong partial conflicts, or weak partial conflicts. Feeney found direct conflicts in 93 cases and "strong partial conflicts" in 65 cases, for a total of 158 direct or strong partial conflicts. About two-



thirds of these were intercircuit conflicts, as opposed to conflicts involving a state court or federal district court. Upon further analyzing the 93 cases with direct conflicts, Feeney concluded that, since some conflicts were duplicated in different cases and since some conflicts were resolved by the Court soon after the denial of certiorari, there was a total of 66 cases with unresolved direct conflicts. Assuming two-thirds of these were intercircuit conflicts, we may estimate that approximately 44 unresolved cases with direct intercircuit conflicts were uncovered by Feeney, or 22 per term. Given the serious expansion of caseload since 1971-72, we would assume that the intercircuit conflicts problem would be far worse today.

More recently, Leland Beck produced an unpublished study which reviewed filings in the Supreme Court during the 1984 term. Beck found that the Court left unresolved a total of 67 "properly presented, independent (intercircuit) conflict issues" after the 1984 term. Given the explosion of the appellate caseload between 1972 and 1984, this total is of the same order of magnitude as Feeney's findings.

Samuel Estreicher and John Sexton contributed to the discussion in a massive article at 59 N.Y.U.L.Rev. 681 (1984). They reported a total of only 16 cases with intercircuit conflicts as to which certiorari was denied in the 1982 Supreme Court term. These findings present a dramatically less serious problem of unresolved intercircuit conflicts than do the Feeney and Beck

studies.

The Virginia Tax Review is now in the midst of an empirical study of intercircuit conflicts in the federal tax area. A tentative draft of the study's findings reported 54 intercircuit conflicts in tax cases during the five-year period covered by the study (the tentative draft does not specify the five years covered), consisting of "33 explicit conflicts, 16 implicit conflicts, and 5 sideswipes." Of these 54, petitions for certiorari were filed as to 38. In twelve of these 38 the Supreme Court either resolved the conflict or granted certiorari; in the remaining 26 the Supreme Court denied certiorari. This would mean that during the five-year period of the study, the Supreme Court declined to resolve approximately five conflicts a year in tax cases. By way of comparison, Feeney found that the Supreme Court declined to resolve three direct conflicts in tax cases in the 1971-1972 terms.

Finally, Arthur Hellman has contributed an article at 11 Hastings Con. Law Q. 375 (1984) which contends that unresolved intercircuit conflicts do not pose a significant problem calling for structural change. This work, however, does not include any fresh analysis of the numerical dimensions of the problem based on raw data. Instead, Hellman bases his conclusion on subjective arguments and on what he sees as the paucity of hard evidence supporting the existence of a serious problem.

On the face of the four studies it is clear that the Estreicher and Sexton study is out of step with the rest, finding only 16 annual unresolved intercircuit conflicts as opposed to 67 in 1984, 22 some 17-18 years ago, and 5 in tax cases alone. One may assume that the disparity results from widely different definitions of what constitutes a "conflict." Indeed, a student note at 59 N.Y.U.L.Rev. 1007 (1984) attempts to re-analyze some of the conflicts cited in the Feeney study according to the much more restrictive definition of a "square" conflict used by Estreicher and Sexton. The note concludes that only 13 of 40 cases cited by Feeney as raising conflicts actually noted square conflicts under the Estreicher-Sexton standard. It does not appear to be possible on the face of these studies to fully harmonize them by adopting a single definition of "conflict" and then applying it to the raw data of each study to test each study's conclusions. Neither Feeney nor Beck presents sufficient raw data and specific case descriptions to permit an outsider to modify the premises of the study and then re-calculate all the numbers. If the subcommittee came up with its own clear definition of what should properly be considered a conflict -- a difficult task -- one possibly could, with much work, pore through the raw data presented, compare each application of the definition of "conflict" with the subcommittee's definition, and try to get a sense of whether each study should be thought to over- or under-estimate the problem. I have not attempted this. Based on the N.Y.U. student note's application of

the Estreicher-Sexton definition of a "conflict," my subjective impression is that that definition is too narrow, too eager to dismiss as not in conflict any factually distinguishable cases no matter how incoherent the legal doctrine they set forth.

The disparity in the findings reported by the three major studies renders it difficult to reach more than a shaky and tentative conclusion about the number of unresolved intercircuit conflicts in, say, 1988. Extrapolating from the Feeney findings to the 1988 appellate caseload suggests 62; extrapolating from the Beck findings suggests 80; extrapolating from the Estreicher-Sexton findings suggests only 22. If we eliminate the Estreicher and Sexton results based on a guess that they may be overly conservative, then we arrive at a very rough estimate for 1988 of 60 to 80 unresolved intercircuit conflicts, of the sort deemed by Beck and Feeney to be "direct," presented to the Supreme Court by petitions for certiorari.

This estimate of 60 to 80 would not include less direct conflicts or sideswipes, cases involving conflicts that for procedural reasons could not be reviewed by the Supreme Court, and conflicts in cases where Supreme Court review was not sought. That could represent a significant omission, since, for example, an "indirect" conflict or "sideswipe" (e.g., a fundamentally inconsistent approach to an issue by different circuits reaching consistent or distinguishable results) on an important substantive issue where national uniformity is paramount could be much more

grave than a direct conflict on an unimportant issue or a matter of procedure. On the other hand, this estimate may also involve some overcounting; the studies are based on only one or two Supreme Court terms and therefore may count some conflicts actually presented to the Supreme Court on more than one occasion.

2. The "Tolerability" of Unresolved Intercircuit Conflicts.

Whatever the bare numbers are, they tell only a small part of the story. One can only gauge the need for federal court restructuring to deal with this problem by scrutinizing the conflicts and deciding which are important or "intolerable," and which are not.

It is in this regard that the work done to date on the intercircuit conflicts problem is sorely lacking. With one exception, no commentator has both 1) argued for and adopted an analytical framework for gauging the significance of a conflict, and 2) applied that framework to a year's worth of particular conflicts to make a reasoned, supported judgment about the magnitude of the problem. Feeney and Beck did neither.

The exception is the Estreicher and Sexton study. They attempted to define what should be thought to constitute an "intolerable" conflict, and suggested that "an intolerable conflict occurs when litigants are able to exploit conflicts affirmatively through forum shopping, or when the planning of primary behavior is thwarted by the absence of a nationally binding rule." 59 N.Y.U.L.Rev. at 725. In those situations, they concluded, any intercircuit conflict must be quickly resolved. Beyond those



situations, however, Estreicher and Sexton cited the advantages of the percolation process in the courts of appeals -- a process which in their view develops and clarifies issues in conflict, contributing in the long run to greater coherence in the law -- and argued that, except perhaps for substantive conflicts in the criminal area, conflicts between only two circuits were tolerable so as to permit further percolation. Once three circuits were in conflict, they conceded, resolution of the conflict generally was necessary, although additional percolation might still be desirable as to procedural matters or trivial issues. Applying these standards to the 16 cases presenting intercircuit conflicts denied review during the 1982 term, they concluded that only 10 presented "intolerable" conflicts. Since they independently concluded that the Court had improvidently granted certiorari in 39 cases, they reasoned that the Court could resolve all intolerable intercourt conflicts simply by better managing its docket.

Two other commentators who have contributed insights into the question of when intercircuit conflicts require resolution -- but who have not attempted thoroughgoing analyses of the question -- are Michael Sturley and Peter Strauss. Sturley, in an article at 67 Texas L.Rev. 1251 (1989), pointed out that in determining the need for resolution of a conflict, one should evaluate not only the abstract importance of the issue itself, but also the need for uniformity in the law regarding that issue. Sturley illustrated this proposition by contrasting conflicts under the Longshore and

Harbor Workers' Compensation Act ("LHWCA"), a statute as to which Congress did not consider national uniformity important but rather intended to mimic state-by-state workers' compensation coverage, with conflicts under the Carriage of Goods by Sea Act ("COGSA"), under which national uniformity is essential so that commercial maritime shippers know who must insure against which risks and at what cost. Sturley found that although conflicts under the LHWCA were relatively inconsequential and conflicts under COGSA were so significant that it was more important they be resolved than resolved correctly, the Supreme Court had been much more willing to review LHWCA cases.

Peter Strauss' article at 87 Columbia L.Rev. 1093 (1987) focussed on the particular conflicts problems associated with judicial review of agency action. Strauss argued that the Supreme Court's inability to resolve all meaningful intercircuit conflicts in this area in a timely manner created a dilemma for agencies charged with uniform administration of a federal statutory scheme but faced with conflicting directives from different circuits. Further, Strauss suggested that the Court's awareness of its inability to adequately police lower court rulings on agency matters had influenced the Court's substantive decision-making, leading it to adopt administrative law doctrines that tended to restrain lower court adventurism or reduce the likelihood of conflicts requiring Supreme Court intervention.

Again, Estreicher and Sexton alone have undertaken the kind of qualitative analysis that is necessary to gain a fuller understanding of the conflicts problem. One may well question their conclusions as to which conflicts are intolerable; they may be overly anxious to tolerate conflicts and overly enamored of the benefits of "percolation." Their numerical findings, as I have noted, are inconsistent with the findings of all other studies. Still, if one were to accept -- as the only game in town -- their qualitative finding that 10 of 16 intercircuit conflicts, or 62 1/2% of the total, were "intolerable," and apply that percentage to Beck's total of 67 unresolved conflict issues in the 1984 term, we would guess that approximately 42 of those conflicts were "intolerable." This number -- arrived at under a standard that might be thought overly tolerant of conflicts -- is substantial.

The existing research on conflicts does not permit firm conclusions, but my best guess is that this total of 42 annual "intolerable" unresolved intercircuit conflicts probably represents a reasonably verifiable minimum. Of course, a less restrictive view of what conflicts are "intolerable" would result in a greater total. Further, these numbers may only represent the tip of the iceberg; again, they do not include those conflicts -- some of which may well be "intolerable" -- not the subject of petitions for certiorari. Although various appellate section chiefs at Justice maintain that unresolved conflicts do not pose a serious problem in cases where the U.S. government is a party because the Solicitor

General generally seeks certiorari in such cases where justified, it may be that a significant number of purely private appeals terminate without an attempt to gain Supreme Court review despite the existence of a significant conflict. Supporting the view that these numbers are the tip of the iceberg is a 1982 internal study by the 11th Circuit, which estimated that 90 of that circuit's decisions that year involved a conflict with decisions of other circuits, 36 creating the conflict for the first time.

Estreicher and Sexton might not recognize even 42 intolerable conflicts as sufficient to justify institutional change, since they concluded that the Supreme Court could resolve additional conflicts cases if not for its improvident grants of certiorari in 39 cases. However, the Supreme Court has its own reasons for granting certiorari to consider issues it deems important. It is not at all clear that those decisions should be or can be second-guessed to such a dramatic extent. Even if Estreicher and Sexton were right, moreover, it would be pointless to pin one's hopes for increased resolution of conflicts on some kind of fundamental sea-change in the Supreme Court's approach to certiorari determinations.

In conclusion, therefore, the existing research does tentatively justify structural change in the federal judiciary sufficient to permit resolution of at least 40 or so additional conflicts cases per year. While this need may not be great enough (at least not now; continuing future increases in the appellate caseload obviously can be expected to result in an increase in

conflicts) to justify creation of a national court of appeals with another layer of judges, it would seem to warrant creation of some form of national en banc procedure for that purpose. It must also be borne in mind, of course, that other recommendations for structural change to resolve other problems, such as intra-circuit conflicts and the workload crisis, could dramatically affect the intercircuit conflicts problem. For example, a shift to additional smaller circuits or to fewer, consolidated circuits would be expected to result in more or fewer conflicts. In any event, discussion of the merits of specific institutional alternatives to deal with the conflicts problem is beyond the scope of this memorandum.

3. Ideas for Further Study. Along the lines suggested by the commentators, the subcommittee needs to identify the considerations that may render particular conflicts more or less tolerable. I will take a stab at that below. Once those judgments have been made, the most useful course would be to mount a study that would use those judgments to study particular conflicts cases over a given time period and evaluate the qualitative as well as quantitative dimensions of the problem (again, Estreicher and Sexton have attempted this, but their work cries out for replication before it is accepted). Perhaps the subcommittee could obtain resources for a crash study of last year's Supreme Court docket or recommend the appropriation of funds for such a study by another body. One promising possibility might be to create a



national en banc panel on a trial basis and to provide funds for an ongoing study of its operation. The actual availability of such a panel would test, as no academic study could, the true dimensions of the problem.

The following is a list of the primary factors that may affect the need for prompt resolution of a particular conflict.

1. The importance, in absolute terms, of the issue presented. Obviously conflicts over trivial issues would not warrant great concern.

2. Fairness to litigants in similar circumstances in different circuits. This fairness concern may urge a greater need for resolution of a conflict in some cases than in others. For example, the unfairness caused by a differing interpretation of a substantive criminal statute would seem to demand prompt attention. (However, Deputy Solicitor General William Bryson and the appellate section chief of the criminal division at Justice both state that they do not believe conflicts pose a serious problem in the criminal area because the Supreme Court resolves the important ones that do arise.) On the other hand, circuit-by-circuit differences in procedural and evidentiary matters may not evoke any fairness concerns.

3. The need to prevent forum shopping. This is a concern notably in the tax area, where litigants have a choice of venue between the Claims Court, the Tax Court, or the taxpayer's local district court, so that appeals may go either to the Federal

Circuit or the taxpayer's local circuit. According to attorneys in the tax division at Justice, the potential problem is exacerbated by the Federal Circuit's rule that it will enunciate its own precedents in tax cases rather than be bound by the precedents of the circuit in which the taxpayer resides (although these attorneys assert that problems have largely been avoided because the Supreme Court generally grants review when necessary in tax cases, denying certiorari only where tax provisions in dispute have been repealed). Congressional action arguably could ameliorate forum-shopping problems, without restructuring the federal judiciary, by modifying venue rules in particular statutes or by specifying choice of law rules that would govern in any court.

4. The need to prevent planning problems or diseconomies for multi-circuit actors. These are situations where the existence of a conflict actually imposes significant costs upon private parties (generally multi-circuit corporations or institutions) faced with conflicting rights and responsibilities in different circuits. As discussed above, Sturley identified one such category of cases arising under the COGSA. The Maritime Law Association of the United States has identified eight examples of intercircuit conflicts it believes affect the interests of its members engaged in maritime shipping. Many tax and securities cases fit the bill, also, where multi-circuit taxpayers or financial institutions require uniformity for purposes of tax planning or securities

transactions. Planning problems would not attend conflicts in procedural or evidentiary matters or in matters affecting individuals, such as civil rights cases, since individuals would not ordinarily be multi-circuit actors conforming their planning behavior to the decisions of various circuits.

5. The need to avoid problems of non-acquiescence by administrative agencies. When circuits conflict in administrative agency cases, the agency is forced to choose between uniform administration of its statutory scheme and obedience to the conflicting dictates of geographically-based federal courts. As a result, either uniform administration is abandoned -- the importance of which depends upon the importance of uniformity in the particular subject matter area -- or the agency must disregard the dictates of a federal court in similar cases. The latter course tends to breed a disrespect for the law inimical to some traditional notions of the American system of justice. This has been a concern most prominently with the Social Security Administration and the National Labor Relations Board. Conflicts also have plagued courts of appeals in multi-circuit social security class actions when the court has had to apply different law to claimants in different circuits.

6. The benefits of the "percolation process" in the courts of appeals. Intercircuit conflicts have a benefit insofar as they identify, develop and clarify tensions and unclear areas in the law for future resolution. Commentators disagree as to whether this

benefit is substantial enough to constitute a meaningful factor in the determination of what conflicts require prompt resolution. To the extent that it does, a desire to reap the benefits of "percolation" would argue against undue concern about conflicts on procedural matters, since it is on procedural issues that the circuits can most credibly be said to function as "laboratories" for experimentation. There might also, of course, occasionally be particular cases raising unusually complex or novel issues where percolation beyond two circuits in conflict might be helpful.

To evaluate the significance of the intercircuit conflicts problem, one must evaluate the importance of each of these factors and determine how many conflicts annually fall into each category. As Estreicher and Sexton argue, conflicts in categories (3) and (4) -- posing problems of forum shopping or imposing planning problems or diseconomies on multi-circuit actors -- require prompt resolution. Conflicts not in these two categories would appear not to pose nearly such a grave concern, except in particular cases where especially important issues are presented, fairness concerns are especially pressing, or concern about agency non-acquiescence is paramount.

Whether the benefits of percolation should be thought to justify delay in resolution of a conflict between two circuits -- so that other circuits may speak on the issue -- would appear highly questionable, except in exceptional cases or in cases involving procedural or evidentiary issues. I question Estreicher

and Sexton's suggestion that because of the benefits of percolation, "ordinary" two-circuit conflicts -- not involving forum-shopping or planning problems or other special concerns -- should be thought tolerable. Such conflicts are substantially less intolerable, but intolerable nevertheless. But because they are substantially less intolerable, the case for restructuring of the federal judiciary to deal with the conflicts problem would be weaker if the bulk of conflicts were determined to be "ordinary" in that they do not pose special concerns beyond a generalized desire for uniformity.

It is for this reason that substantial further work to classify conflicts among these categories is desirable. Such an effort might well require investigation of particular industries and administrative agencies to determine what intercircuit conflicts actually impose planning problems, diseconomies, or additional costs on them. The definitive study has not yet been done. As earlier stated, however, existing research suggests that the problem is a very real one.



# III.

Appellate

Structure

Issues

**A Preliminary  
View of the  
Problems that  
Have led to  
Proposals for Change**

## I. Background.

A. History. Article III of the Constitution created the Supreme Court and conferred upon Congress the authority to establish inferior federal courts. Congress exercised this authority in the Judiciary Act of 1789 -- the foundation stone of the federal court system -- by creating two sets of inferior federal courts. The district courts were established as courts of original jurisdiction authorized to hear largely admiralty cases and certain minor criminal cases (and, later, bankruptcy cases).

The circuit courts -- one for each of three circuits -- were granted both original and appellate jurisdiction: original jurisdiction over diversity cases, most criminal cases, and cases in which the United States was a party, and appellate jurisdiction over most district court decisions. The Supreme Court, generally speaking, heard appeals as of right from the circuit courts and from state court decisions raising federal questions. District judgeships were created, but the circuit courts had no fixed place of sitting and no judges of their own. Instead, each circuit court held sessions at each district in its respective circuit, with the panel consisting of two Supreme Court justices (after 1793, one justice) and the district judge for that district. In 1869, Congress authorized the appointment of one circuit judge for each circuit. Until then, only two sets of judges did the work of three separate tiers of courts.

Not until 1875 was general federal question jurisdiction conferred by Congress upon the federal courts. This additional jurisdiction, accompanied by a broadening of diversity jurisdiction, produced congestion in the federal courts. That emerging problem led to calls for a wholesale restructuring of the federal courts to handle the increased workload. That restructuring was effected by Congress in the Evarts Act of 1891.

The Evarts Act put into place the institution of the federal circuit courts of appeals that exists today. The Act created a circuit court of appeals for each of nine regional circuits, thereby replacing the existing three circuits with nine smaller circuits. Each circuit court of appeals consisted of three judges, two circuit judges and either a Supreme Court justice or a district judge from that circuit (subsequently, this structure was modified so that each circuit court of appeals consisted entirely of circuit judges). The circuit courts -- as distinguished from the newly-established circuit courts of appeals -- were stripped of their appellate jurisdiction, but retained their original jurisdiction. Except for certain types of cases where direct review by the Supreme Court was available, appeals from both the circuit courts and the district courts went to the circuit courts of appeals on a regional basis. In diversity cases and certain other categories of cases, a decision of the circuit court of appeals was made final unless the Supreme Court, in its discretion, accepted the case for further review by granting a writ of certiorari, or unless the

court of appeals certified a question to the Supreme Court. In other cases, parties had a right of appeal to the Supreme Court from a decision of the circuit court of appeals.

The old circuit courts were finally abolished in 1911. Their jurisdiction was transferred to the district courts. With this change, the present structure of three tiers of federal courts with three sets of judges -- the district courts exercising original jurisdiction, the circuit courts of appeals exercising appellate jurisdiction, and the Supreme Court -- was in place.

As the nation grew, more circuits gradually were added to the nine original circuits. The D.C. Circuit was added in 1893. In 1929, the original 8th Circuit was split and the 10th Circuit was created from part of what had been the original 8th Circuit. In 1981, similarly, the 11th Circuit was carved out from the original 5th Circuit. In 1982 Congress created the Court of Appeals for the Federal Circuit and granted it nationwide jurisdiction to hear appeals in patent cases and in cases involving claims against the United States.

The most important development for the circuit courts of appeals since their creation in 1891 has been the gradual increase -- very marked in recent years -- in their caseload. From 1892 to 1960 the number of appeals heard by the courts of appeals increased from 841 to 3,765. In 1970 the number reached 11,490; in 1980, 23,155; and in 1988, 35,888. The number of circuit judges, of course, also has increased, from 10 in 1892 to 66 in 1960, 90 in



1970, 120 in 1980, and 158 in 1988, but this increase has not kept pace with the surging caseload.

Direct review by the Supreme Court of district court decisions was abolished by Congress in 1925, except for a few remaining limited categories of cases. In addition, the same legislation greatly increased the range of cases as to which the Supreme Court had discretion whether to hear an appeal -- by use of the discretionary writ of certiorari -- from either the circuit courts of appeals or the state courts. Only in a limited range of cases was the Supreme Court still required to hear an appeal. This development, undertaken in order to ease the Supreme Court's growing burden, was one of portentous significance for the circuit courts of appeals since it planted the seeds of a greater national role for the courts of appeals in divining federal law.

B. Present structure.

The circuit courts of appeals currently consist of twelve regional circuits -- the First through Eleventh Circuits plus the District of Columbia Circuit -- and the Federal Circuit. The courts of appeals range in size from six to twenty-eight active judges. Except for a few limited categories of cases in which a party may appeal directly from the district court to the Supreme Court, the courts of appeals handle almost all appeals from the federal district courts as well as petitions for review of decisions of many federal administrative agencies. Since review by the Supreme Court of decisions of the courts of appeals is

available in most cases only by the discretionary writ of certiorari, and since the Supreme Court grants that writ only in a few cases, the courts of appeals function as the final arbiters of federal law in the overwhelming bulk of cases.

Each court of appeals hears cases in panels of three. A party may petition for en banc review by a larger panel, at the discretion of the active circuit judges. In all but one circuit, cases are heard en banc by all of the court's active circuit judges, plus any senior judge of the court who happened to sit on the original panel. In the largest circuit, the Ninth, a rotating panel of eleven judges hears cases en banc pursuant to a limited en banc procedure, replacing the cumbersome practice of en banc rehearings by all twenty-eight active Ninth Circuit judges.

In addition to the thirteen circuit courts of appeals, which, except for the Court of Appeals for the Federal Circuit with its specialized nationwide jurisdiction over patent cases and federal contract cases, essentially exercise general appellate jurisdiction on a regional basis, there are several specialized appellate courts within the federal system. The Temporary Emergency Court of Appeals, created in 1971 to review cases arising from the short-lived program of wage and price controls, has since been given jurisdiction under other statutes. A special court created by the Regional Rail Reorganization Act of 1973 has exclusive jurisdiction to review certain matters arising under that statute. Both courts have no judges of their own and are staffed entirely by judges of

other federal courts sitting by designation. The Court of Military Appeals, an Article I court, has nationwide jurisdiction to review military convictions by courts-martial. Finally, the District of Columbia Court of Appeals hears appeals from the District of Columbia Superior Court, a trial court of general jurisdiction that decides cases arising under the local law of the District of Columbia enacted by Congress. Accordingly, the District of Columbia Court of Appeals, although a federal court, is analogous to a state Supreme Court, its decisions reviewable by the Supreme Court on certiorari.

## APPELLATE STRUCTURE

### A Preliminary View of the Problems

#### that have Led to Proposals for Structural Changes

#### I. Background

A. History [To be written]

B. Current Status [To be written]

#### II. Perceived Problems

Problems that suggest a need for making fundamental changes in the structure of the federal appellate system all stem from the phenomenal growth in appellate caseload. At the heart lies a dilemma: as more circuit judges are added, the capability of courts of appeals, sitting in three-judge panels, to provide, clear, non-conflicting precedents diminishes. (Especially is this a concern given the continuing, dramatic drop-off in the proportion of appeals the Supreme Court is now able to decide.) Yet if more judges are not added, bureaucratized or assembly line decisions may be inevitable as judges become responsible for deciding more appeals than they can competently handle.

In the first half of the 1900s, after the present circuits were formed, the Supreme Court could easily manage its role of declaring policy and law for the entire federal courts system. Thus the Supreme Court itself reviewed about 6.2 percent of all

federal appeals in 1915, a sufficiently large proportion for it to be able to resolve most intercircuit disputes, to construe important new laws, to interpret the Constitution, and to straighten out misconceptions by the lower courts as to the nature of the federal law. Because each circuit court of appeals had no more than three or four judges, the individual circuits — sitting in three-judge panels — had little difficulty in assuring that the precedents within each of them were kept relatively uniform. Significant conflict in federal law occurred only when two or more circuits differed in their views of a particular legal question. Given the lower caseload and the narrower range of issues then heard in federal courts, such instances must have been dramatically fewer than currently. Anyway, such conflicts were grounds for seeking Supreme Court review; and, given the relatively few appeals in the system, the Supreme Court normally obliged.\*

The dramatic rise in caseload — coming at a time when the issues presented to federal courts have increased vastly in complexity — has altogether changed this picture. The Supreme Court continues to have essentially the same size and decisional capacity as before (approximately 150 cases per year). The complements of judges in the courts of appeals have enormously

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\*Of course many differences between circuits could and can be accepted without need for the Supreme Court to intervene: for example, local variations in a host of procedural matters could be accepted and, indeed, might well be desirable.

expanded, however. All have more than the original three judges. The smallest, the First Circuit, has six judges, and the largest, the Ninth, has 28. Most of the remaining 11 appeals courts have 12 or more judges. These numbers are augmented by senior and visiting judges. Sitting in panels of three, with very occasional en banc sessions, the courts of appeals in 1988 handled 35,888 appeals. This is a 3,408 percent (35 fold) increase over the numbers in 1900 (nine years after the present circuits were founded), a 1,701 percent increase over the numbers in 1950, and a 235 percent increase over the numbers of appeals in 1970. There are 690 cases per appellate judge today as compared with 331 cases in 1970. At the present rate of increase in appeals, if no new judges were appointed, there would be 1,150 cases per judge in the year 2000.

Because the Supreme Court has remained the same size and will likely remain so in the foreseeable future, the proportion of total federal appeals which that court decides has dropped from 7.4 percent in 1900, 6.2 percent in 1915, 2.9 percent in 1950, and 1.0 percent in 1970, to .4 percent today.\*\* The result of the increase in total numbers of appeals, and the corresponding drop in the proportion of appeals the Supreme Court can decide, has been that the Supreme Court's ability to influence and control the system,

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\*\*These figures need further refinements but are close enough to give a fair picture. LHC



by itself deciding most all of the important precedential cases, has diminished. Many of these cases are instead now decided finally by one of the circuit courts of appeals. Looking solely at the proportion of total federal appeals the Supreme Court itself can hear, the Supreme Court's relative influence can be said to be 15 times less in 1988-1989 than it was in 1915. While this is plainly too simplistic a statement (given the many other factors that affect the Supreme Court's ability to influence the judicial system), there can be no question that the law-declaring functions of the courts of appeals vis-a-vis the Supreme Court have grown enormously.

Three interacting problems have accompanied the phenomenal growth of this "bulge" at the courts of appeals level: escalation of 1) intercircuit and 2) intracircuit conflicts, and of 3) judge and chambers overload. Each of these problems is discussed below.

#### 1. Intercircuit Conflict

The courts of appeals are 13 courts rather than one court; a legal precedent in one circuit is not binding in another. Hence, conflicts are both likely and common between the decisions on points of law of one circuit and another. Since the Supreme Court no longer accepts and decides many cases where there is a conflict between circuits, there must be a growing number of instances where the federal law, as declared by the courts, remains more or less permanently different in different parts of the

nation. It is a judgment call as to how serious and what the effects of these discrepancies are. Certainly there are many areas of law where differences in circuit precedents (like differences in state court precedents among the states) are of no great harm, and may even be desirable. On the other hand, there are other situations where it seems likely that serious harm may occur if federal laws are differently construed around the country. Intercircuit discrepancies are known to impact upon the operations of federal agencies, which then have to tailor their policies differently in different circuits in order to conform to the conflicting judicial commands. They may also invite forum shopping, breed disrespect for the law, and encourage litigation rather than settlement of disputes. To what extent business costs are increased by conflicts is not known; possibly the costs are great, possibly not. The studies so far made of intercourt conflicts, while clearly documenting their existence, have not focussed on attempting to quantify the extent and harm of their impacts. Hence while we know there is a problem, it is an open question how much "real" harm, economic or otherwise, results. One's perception of the extent and harm of intercourt conflict will, of course, have a significant effect upon one's view of whether or not there is a need for remedies, including but not limited to such structural changes as an intercourt tribunal, aimed at curtailing such conflict.

## 2. Intracircuit Conflict

Operating in shifting three-judge panels, today's multi-judge courts of appeals have difficulty harmonizing the precedents within their particular circuits. A recent Ninth Circuit poll indicates a widespread perception among lawyers and judges that different panels of that court resolve legal issues differently. Since 99.6 percent of all cases are finally decided at the circuit levels — rather than going on to the Supreme Court — the stability and clarity of circuit precedents are obviously important matters. The growth in the number of judges within each circuit, and the complexity of issues today, have multiplied the possibilities for subtle and not so subtle differences between panel opinions within one circuit. While each panel is supposed to follow the law as enunciated in prior circuit panel opinions, the opportunities and pressures for variance are too great to expect conformity in all instances, especially in huge circuits such as the Ninth, where there are 28 circuit judges and, at any time, a number of district, senior and visiting judges sitting on the court of appeals. While incoherence in the law of a particular circuit is supposed to be checked by the en banc process, this is too cumbersome a device to be invoked in anything like all cases where problems may exist — even where, as in the Ninth Circuit, an en banc panel of 11 is allowed by law. Professor Arthur Hellman has recently studied intracircuit conflicts in the Ninth Circuit,

and we shall have the benefit of his perspectives. One's view of the extent and seriousness of intracircuit conflicts may depend at bottom on one's definition of what is a "conflict" between opinions and one's sense of just how tolerable or intolerable such conflicts within a single circuit are. As is true with intercircuit conflicts, there have been no studies aimed at determining the economic and other harm that such disparity may cause. Also to be considered are the growth projections which indicate that by the year 2000, the Ninth Circuit is likely to have 30 active judges and the other circuits will have likewise increased, thus accentuating the problem of intracircuit disparity (to whatever extent one believes it is a problem).

### 3. Overload and Bureaucratic Decisionmaking

While the growth in appellate caseload has been accompanied by the creation of many new judgeships — giving rise to the problems mentioned above — the number of new judgeships has not kept pace with the caseload. As a result, an individual appellate judge today handles on an average of 6.3 times the number of cases handled in 1900; 4.9 times the number of cases handled in 1950; and 2.1 times the number of cases handled in 1970. To help meet this increase in per-judge caseload, judges' staffs have been augmented. Today each federal court of appeals judge has three law clerks and two secretaries as compared with a single secretary and one law clerk a few years earlier. Each circuit also now has staff

attorneys equal in number to its judges. These typically help screen incoming cases for jurisdictional defects, for frivolousness and for a determination as whether oral argument can be dispensed with in that case. Today's appellate courts, unlike their predecessors, may dispose of 50 percent or more of their caseloads without oral argument. Several courts also have "CAMP" screening and settlement programs. By expedients such as these, federal appellate courts have managed to increase their output to keep pace with the rising tide of appeals. But while most circuits have by increased productivity managed to keep relatively current — i.e., all except a few can be said to be disposing of all the cases they receive within a reasonable time frame — there is general agreement, at least among judges, that if the numbers continue to rise, the courts of appeal will be unable to keep up without seriously compromising the "process" which has been their hallmark. At the heart of this "process" is the concept that judges do their own work or at least exercise such close personal supervision over the law clerks and staff attorneys who perform the details that the final product can fairly be considered the judge's own. Thus judicial work is not "delegated" in the usual sense, although, today, a judge's staff is more likely to participate actively than was true two decades ago.

It is widely believed, in any event, that the federal appeals courts have about reached the limits of using law clerks

and staff attorneys to increase productivity — at least this is so if judges are to retain their traditional close involvement in the work produced. The truth of this perception is supported by the fact that the per panel productivity of the federal circuit courts matches or exceeds the maximums deemed feasible by Carrington, Meador and Rosenberg in their book "Justice on Appeal," written in 1976. Initial surveys also indicate that the productivity of the federal appellate courts matches, and frequently far exceeds, that of comparable state courts, including some regarded as particularly overburdened. Hence it is reasonably feared that further per-judge workload expansion, with resultant enlargement of delegation to staff, will result in such an erosion of the judge's personal input that appellate opinions will become the work product of clerks and staff counsel and, only in a very remote way, that of the judge. This is a serious, immediate, concern since the annual increase in numbers of appeals has yet to abate. If the increase continues and new judgeships are not created, judges will have less time to devote to each case, and the pressure for more staff will be substantial. Congressional creation of more judgeships could, of course, ease this problem. But many people feel that adding new judges to already large courts



tends to diminish collegiality, quality and overall efficiency.\*\*\*  
Doubling the number of judges, they say, does not necessarily double productivity. For example, judges on a large court spend more time reading colleagues' opinions. Other less quantifiable matters — such as the judges' sense of being automatons in an impersonal system — may take their toll. And even if adding more judges will adequately increase productivity, the new judges will inevitably — given the present structure — add to the problem of intercircuit and intracircuit conflicts, resulting in a greater measure of disparity in the federal law as declared by panels within the same circuit.

Means (besides increased staff) that might enable the same number of judges to handle more cases have been suggested. One proposed remedy is the creation of "appellate magistrates" or "commissioners" who might, under supervision of judges, handle appeals which lack major precedential significance and thus need not result in published opinions. One potential problem with this is that trial judges may resent review by such a personage. Alternatives to this might be one or two judge panels; district

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\*\*\*Chief Judge Roney told me, for example, that former members of the undivided Fifth Circuit doubt that the Fifth could have performed its critical role in the civil rights controversies in the late 1960s if it had had more than 15 judges. It was essential for the judges to reach a consensus and act as a body. On the other hand, Judge Clifford Wallace of the Ninth Circuit believes that 28 judges are manageable.

judge panels; and expedited track appeals. Existing appeals settlement programs, such as the Second Circuit's CAMP, may also assist to a degree; these are already in place in some courts. And some commentators recommend limiting the number of appeals by instituting certiorari or imposing economic disincentives, such as attorneys' fees, upon losers. While all of these devices warrant further study, none of them is likely to provide an extraordinary increase in productivity. Our Committee might well, however, recommend some or all of these for pilot study.

There is also the option (albeit one fraught with immense political problems) of dividing some of the larger circuits into smaller ones. This might make it more feasible to add more judges without overloading a circuit. Certainly the present variation in size among circuits (ranging from six to 28 judges) seems peculiar in a federal system. It should be realized, however, that such an increase in the number of circuits, while reducing intracircuit conflict, would increase the likelihood of intercircuit conflict, and the need for some mechanism to reduce the same.

Based on the above description, the following argument can be made: The appellate caseload (which so far in the courts of appeals continues to rise) cannot be satisfactorily handled simply by adding judges within the structure as now established. While more judges are needed to avoid having appeals decided by faceless staff,

personnel, more judges will not resolve, indeed, they will exacerbate, the problem of intercircuit and intracircuit conflict.

The problems of intercircuit and intracircuit disparity (the argument continues) are magnified by the growing proportion of important appeals that end at the circuit level without review by a national tribunal. If more and more essentially final constructions of the Constitution, of congressional statutes and of major legal issues, are being made by circuit courts, can we endure a system with so little means for insuring uniformity?

Put another way, where the Supreme Court now lacks the capacity to perform fully its role of providing uniform federal precedent, can we live comfortably with the piecemeal decisionmaking of 13 different federal circuits which, themselves, can no longer control even their own internal precedent? Some people argue that we are in the same boat as were many states before they established the now prevalent layer of intermediate appellate courts: the federal system, it is said, needs similar restructuring to handle today's volume; structural reform is needed to give it the ability to handle today's and tomorrow's volume in a coherent manner.

These arguments are, of course, subject to contrary ones. It is argued that disparity is not all that bad, flexibility has many virtues, a decentralized system better fits our large nation, etc. It is also argued that there is no way to restructure the

system without ruining it — that caseload reduction initiatives, such as lessening federal jurisdiction, fee shifting, or other means of cutting back the volume of appeals, are the only tolerable measures to achieve reform.

The above arguments are meant to include the most potent reasons for considering serious structural changes. However, these arguments, even if persuasive, do not demonstrate that there are, necessarily, viable structural alternatives. Conceivably there are no structural alternatives that will make things any better. Those attracted by the prior arguments must take the next step, which is to study the structural alternatives that different commentators have suggested and compare their advantages and disadvantages with today's problems. Many different structural reforms have been proposed, without acceptance so far. These proposals are the product of careful thought by able people and are available as guides, although there is no reason to suppose that these commentators have thought of everything. This paper does not attempt to set out the structural alternatives that have been proposed. A list and description of them and a list of the major writing in this area are "musts" for future consideration by our subcommittee.

In conclusion, may I say that the reader's reactions to the nature and seriousness of the problems stated herein are key. For example, if the problems of intercircuit and intracircuit

conflict seem relatively tolerable, the reader may be unimpressed — and perhaps rightly so — with the need for change. Concentration will then be upon persuading Congress to create the necessary new judgeships to keep up with the rising caseload, and upon such reforms and improvements as can be devised to maximize the efficiency of the existing circuit courts.

If, on the other hand, the reader is deeply worried by the problems, he or she will want to look more deeply into whether there are structural alternatives that will enable the federal courts to cope better with the rising caseload. One must then determine whether and what structural changes offer promise. A structural change that doesn't meet the perceived problem will be of no use. The proposal, moreover, should be fleshed out in detail and tested against statistical data. For example, proposed "specialist" appellate courts must be modelled by answering (a) what categories of cases will such a court or courts handle; (b) how will this affect the numbers of appeals left over for the geographical appellate courts. The creation of working models is necessary to decide whether a particular structure offers promise.

## Preamble

This subcommittee has been charged with examining the structure of the federal courts and recommending such changes as may be appropriate in that structure. The task of the subcommittee is enormous and daunting. Yet, it is made easier if, at the outset, we state, at least in general terms, the scope of our inquiry and the criteria for suggesting significant structural changes.

Structural change is often called for when it is unnecessary or inappropriate. Often there is a call for structural reform when the problem is not structural but human. For instance, an organization has a high ranking official who is waiting for retirement and is no longer interested or productive. Persons both above and below that person in the structure may call for or support structural change so that they do not have to resolve the real problem which is a personnel matter. The change in structure will inevitably survive the person who caused the change.

In other instances structural changes are called for because in theory they make sense. That is, if one were starting from a clean slate, one would include certain structures not currently present. These changes would move the structure towards some ideal, but when applied to existing structures such "perfecting" changes must be analyzed carefully.

Imposing one set of ideal structures from the outset of an organizational history involves no great costs. When the organization is well under way, inserting such changes involves significant costs.



For example, and only by way of example, if the United States had somehow reached 1989 without a federal court system, a team set up to create such a system might well suggest four tiers, with the Supreme Court reserved for major constitutional cases and cases of constitutional conflict among the circuits. The court system might have 20 circuits. Panels of the circuits might have two judges, with tiebreaker available in case of need. All of these things might make compelling sense if starting from scratch.

However, when structural changes are applied to existing institutions, there are significant costs not associated with fresh starts. At one level there are changes in status and prestige. At another level there are monetary costs ranging from the printing of new rules, to attorneys' time in learning the new structure and correcting the inevitable mistakes that come during such learning.

It would seem to follow, then, that structural change ought not to be made to resolve personnel (or other short-lived) problems and that structural change ought not to be made simply because (like a new car) the new model is more attractive than the old one was.

Structural change should be made because there is a problem that can be solved only through structural modification and the benefits of structural modification outweigh the costs.

This may be seen as an essentially conservative statement, an unwillingness to take bold steps, a sort of knee-jerk "if it ain't broke, don't fix it" attitude. But in reality it is merely a rule of prudence. Structural changes are too hard to achieve and too costly to implement to pull them out where some other resolution

is available or the problem can be lived with. By preserving structural changes for such instances, we make them easier to attain when truly needed.

The Subcommittee has proceeded in that light. We believe that, in the long run, this approach preserves both the credibility and utility of our product.

Intracircuit conflicts obviously involve those instances in which two panels of the same circuit disagree on the same issue of law. Such instances are inappropriate at least to the degree that they lead to differing results in the current cases or the prospect of different results in future cases. More subtly, though, cases within a circuit that are in theoretical conflict are nearly as troublesome. Such cases make knowing the law with certainty much more difficult.

For instance, assume that a panel of the First Circuit decides that Puerto Rico should be treated as a state under a statute even though not specifically included because, unless specifically excluded, it should be included. Another panel dealing with another statute treats Puerto Rico as a state, though not specifically included, because its reading of the legislative history indicates that that was the Congressional intent. The opinions are theoretically in conflict and that conflict will cause litigation that would have been avoided by a single approach to the problem.

We can measure the direct intracircuit conflicts both anecdotally and empirically. Anecdotally, a survey in the Ninth Circuit has indicated that 40 % of the district court judges in that circuit and 31% of a sample of attorneys practicing in that court agree that panels of the 9th Circuit sometimes do not adhere to the law announced in prior opinionions and only 31% of the judges and 41% of the lawyers agree that there is consistency between panels considering the same issue. Empirically, we have

requested that each circuit provide the number of en bancs in 1988 devoted to an issue of intracircuit conflict. In the four circuits that have responded so far, only three such cases have been reported. This data understates the true number of conflicts because not every such case will lead to an en banc either because the losing party does not seek further review or the court is reluctant to grant such requests.

What does seem obvious is that direct intracircuit conflicts are more frequent in larger circuits. Such a conclusion suggests the creation of special mechanisms for the large circuits and no changes in the small circuits. Yet dealing with the large circuits and their direct conflicts does little to resolve the theoretical conflicts mentioned above.

It can be argued that, in the light of the whole host of problems facing appellate courts, there is no time or resources for dealing with theoretical differences. Yet, common sense suggests that dealing forthrightly with these differences will yield long term savings for the courts as well as for litigants.

Intracircuit conflicts, then, present two problems. First direct conflicts must be avoided or resolved. Second, doctrinal differences must be avoided or resolved. Some of the mechanisms below would assist with one problem. Others would help with both.

#### A. Modified En Banc Panels

This model would provide for an en banc panel of less than the full court. It is already in place in The Ninth Circuit by statutory arrangement. The model makes the en banc mechanism less

unwieldy and thus more likely to be used by the court. However, the losing party will not always call for an en banc and the court will not always sua sponte summon one because it is not always aware of a conflict. Thus, while an advance, modified en bancs are at best a partial answer to the two problems presented.

#### B. Senior Panels

Senior panels would consist of a group of say 5 judges who would be charged in general or by specialty with the duty of promoting doctrinal unity. They would review opinions before mandate issued and could either take the case themselves or order it assigned to an en banc panel.

#### C. Staff Review

Senior staff could be assigned the duty of reviewing cases, again either generally or by subject matter, for doctrinal regularity. When a problem was discovered they could report by memorandum to the court. The court would then be free to apply its en banc procedures or to resolve the problem in less formal ways. Such a mechanism is in place already in the Federal Circuit, and is reportedly working well.

#### D. Smaller Circuits

The present circuit structure could be altered to accommodate perhaps twenty circuits, each with nine or fewer judges. These circuits would theoretically be better able to control internal precedent. Such a multiplication has been opposed in the past because it would seem to have the effect of increasing intercircuit conflicts. However, if a mechanism (such as regional en bancs) was devised for resolving intercircuit conflicts and it was effective,

the combination might produce a reduction in intracircuit conflicts while not producing unmanageable intercircuit conflicts.

The problem of intracircuit direct conflicts may well be confined to those courts with a dozen or more judges and creating more circuits might thus resolve it. However, even in the First Circuit with only 6 judgeships, there is a sense of losing control of precedent. That sense accompanied by increased filings in the courts of appeals will ultimately lead to direct conflicts regularly taking place in even the smallest of the circuits. Such a situation should be avoided by one or more of the mechanisms described above.



## Intercircuit Conflicts

A major reason advanced for alteration of the appellate structure in federal courts has been the existence of intercircuit conflicts. Such conflicts lead to two separate problems. First, they create an untidiness in the law which diminishes respect for law and may lead to additional litigation, as plaintiffs, doomed in one circuit, find another forum which may be amenable to their position. Second, intercircuit conflict is said to increase the burden on the Supreme Court. That court is the only mechanism, short of legislation, for resolving such conflicts. As conflicts increase so too do the number of applications for certiorari based on the existence of a conflict.

However, before the existence of intercircuit conflicts can be used as a basis for major structural overhaul, three questions must be answered. Are there, in fact, a high number of intercircuit conflicts? Of the conflicts that do exist, how many really involve a difference in law that will lead often to a difference in result? If there are a significant number of substantive conflicts, are there methods short of a major structural overhaul to resolve or avoid such conflicts?

### 1. The Number of Intercircuit Conflicts

There are three major sources helpful in determining the number of intercircuit conflicts. The first is the report of the Hruska Commission. That document, however, was prepared in the early 1970's and its continuing utility is subject to doubt. Given the explosive rise in caseload since the Commission issued its

report, it seems fair to assume, though, that a greater problem exists today than existed at that time.

The Commission approached the task in two ways. First, it gathered what may be described as anecdotal material. These were descriptions of illustrative conflicts. Second, it examined petitions for writs of certiorari for conflicts and classified the results as direct conflicts, strong partial conflicts, weak partial conflicts, and no conflicts.

In examining the docket of the Supreme Court over a two year period (1971-72), the Commission found direct or strong partial conflicts in 168 cases, 17% of those examined. Of the 90 direct conflicts, more than half were in criminal cases and about three-fourths of the total were conflicts between two federal courts (as opposed to conflicts between a circuit and a state court or a state court and another state court).

Assuming that the proportion of one intercircuit conflict arising for every 175 cases filed in the circuits remains true, even though the gross numbers may have increased (from 11,662 cases filed in the circuits in 1970 to 37,524 filed in the circuits in 1988), this survey suggests that in 1988 the same survey would report 212 direct intercircuit conflicts in which certiorari was sought.

The second source is more recent. It is a massive paper done for Chief Justice Burger by Leland Beck. Beck reviewed the cases filed in the Supreme Court during the 1984 term. Beck found 136 instances of intercircuit conflicts or roughly one for every 210 cases filed in the circuit courts in the previous year.

While the number of conflicts found by Beck are lower than expected based on the Hruska Commission work, these differences may well be due to different definitions.

Taking the two studies and striking a rough average, it seems fair to operate on the premise that one intercircuit conflict will arise for every 150 cases filed in the circuits (0.6%). Thus in 1988, 250 such conflicts would be expected to have arisen.

The third study is a forthcoming survey done by the Virginia Tax Review. It is limited to tax cases and the time period involved is not disclosed in the portion that we have received. This survey reports 88 circuit cases which represented a conflict with another circuit out of 618 tax cases studied (14.7%), or roughly 1 out of 7. At first glance, this would suggest a rate of conflicts in tax cases more than 20 times higher than the rate of conflicts found in certiorari petitions. However, the methodology is quite different. First some conflicts are counted many times. That is, if the First Circuit decided during the study period that teachers can deduct their expenses for foreign travel and the other 12 circuits reach the opposite result, this survey would list 13 conflicts instead of one. Second, the existence of a conflict is measured at the circuit level, not at the Supreme Court level.

Arguments can be made for both methodologies. Measuring at the circuit level gives a truer indication of the gross number of conflicts since not every conflict will result in a certiorari petition. Measuring at the Supreme Court level gives a truer indication of the number of substantive conflicts, since it seems logical that attorneys filing petitions for writs of certiorari

believe that the issue in conflict effects the substantive rights of their client.

## 2. The Number of Substantive Conflicts

The term "conflict" is subjective. The term "substantive conflict" is vastly more subjective. A floor can be established, though. It is fair to assume that those cases in which a conflict exists and in which the Supreme Court grants certiorari and resolves the conflict, involve substantive conflicts. In the Beck study there were 54 cases decided by the Supreme Court involving intercircuit conflicts. This was one-third of the Court's merits caseload. But of these cases, Beck classifies 25 as statutory interpretation cases, an additional 12 cases as involving conflicts in principle, but not in result (different approaches to the same subject), and 2 more cases as either involving not a true conflict but a theoretical one (as when two courts interpret two similar statutes differently) or as involving a procedural matter.

If one defines "substantive conflict" narrowly, then it is possible to argue that these 14 cases (the cases involving differences in approach, theory or procedure) should not counted. On the other hand since it is obvious that some substantive conflicts were not brought to the Court, the figure of 54 substantive cases is a reasonable floor. A higher assumption can be made on the theory that tax and criminal law are involved in a great portion of the conflicts and the United States is a party in all such cases. The Solicitor General decides whether to seek certiorari when the United States is on the losing side in such

cases and he or she is traditionally reluctant to seek certiorari. This reluctance means that the 54 cases is probably significantly low. A figure of 100 intercircuit substantive conflicts per year would be an approximation but a defensible one.

### 3. Methods Short of Major Structural Change

It must be remembered at the outset that any method applied to resolve intercircuit conflicts will probably leave the state court conflicts and state-circuit conflicts unresolved. Thus, no matter what is done, the Supreme Court will be called on to resolve a number of conflicts every year. This group of conflicts is probably almost entirely of constitutional dimension and there are factors of Federalism involved, so this result may be seen as quite appropriate. The Supreme Court and the Supreme Court alone ought to resolve such conflicts.

With that limitation, there are set forth below, in summary form, the methods that might be applied to resolve intercircuit conflicts short of creation of a new tier. For these purposes a "tier" involves a new court with new judges, significant new procedures and new administrators. Methods that involve none of these additions are not major structural changes but a reallocation of existing resources to meet the intercircuit conflict problem.

#### A. Intercircuit Tribunal

The intercircuit tribunal would act as a sort of national en banc court. With judges drawn, perhaps randomly, from every circuit, it would sit in panels large enough (5 or more) to be



authoritative but small enough (9 or less) to not be unwieldy. Conflict among the circuits could be appealed to this court and certiorari could be taken from its decisions though one would assume that this would be routinely denied.

#### B. Reduce the Number of Circuits

In theory a reduction in the number of regional circuits to 5 or 8 would lead to fewer intercircuit conflicts. In theory, also though, it would lead to an increase in the number of intracircuit conflicts. Moreover such a proposal would lack support among judges. It would take a brave messenger to announce that the appellate court problems had been resolved by duplicating the size of the Ninth Circuit nationwide. This opposition would be based on administrative difficulties and loss of collegiality which ultimately follow from great size. These arguments are not necessarily parochial.

#### C. Regional En Bancs

Regional en bancs might be created for every three circuits. These panels would resolve conflicts among their constituent circuits and make more authoritative statements about conflicts between a constituent circuit and another circuit. Of course, these four panels would themselves sometimes be in conflict but such instances would be reduced from the present number of conflicts and greater percolation would take place than would occur in the Intercircuit Tribunal model.

#### D. Law Revision Commission

A Law Revision Commission would consist of representatives from all three branches of government who would regularly advise



Congress on the existence of statutory conflicts. The assumption is that the commission would have sufficient prestige to induce Congressional action.

#### E. Rule of Three

This mechanism would resolve statutory conflicts by creating a presumption that the first side of question to draw the support of three circuits would be correct. Under this structure conflicts might sit around for many years or never be resolved.

#### 4. Major Structural Changes

The models described below would serve as mechanisms for resolving or avoiding intercircuit conflicts. They sometimes carry other benefits as well. For instance a National Court of Appeals would not only resolve conflicts, it could also give more authoritative disposition to cases of great significance where the circuits were not in conflict. It could also quickly resolve issues (such as the constitutionality of sentencing guidelines) that will obviously ultimately result in conflicts. Specialized courts of appeals would avoid conflicts in their areas and would also somewhat reduce the caseload of the regional circuits.

However, each major structural change carries a price tag. They require new resources which are hard to come by these days. They involve disruption of historic patterns. They are subject to a political process whose outcome can never be predicted with certainty.

##### A. National Court of Appeals

Such a court would constitute a permanent fourth tier. Its

judges would serve only on it and it would have its own clerk's office and administrative structure. Its mandate could be broad including appellate jurisdiction as to all conflicts and certiorari up from the circuits and referral down from the Supreme Court in other cases. It would sit in panels of at least 5 judges. While this mechanism would reduce or eliminate conflicts among the circuits and perhaps otherwise reduce the burden on the Supreme Court (as by giving authoritative decisions in some Constitutional cases), it reduces the stature of the circuits and might end up being just one more hoop that must be leapt through on the way to the Supreme Court. This proposal might be coupled with elimination of the regional circuits as separate judicial entities. Such a structure provides some flexibility in balancing workloads and meeting emergency situations and is viewed by some as removing an essentially artificial and outmoded aspect of the appellate structure.

#### B. Specialized Courts of Appeals

This model would create specialized courts to deal with subject matters such as tax, Social Security or immigration law where uniformity of result is especially desirable and the cases involve largely factual determinations. Such courts would provide uniformity in the law and would ease the burden of the existing regional circuits though one must assume that the new resources provided for such courts, if given to the regional circuits, would also ease the burden of the circuits. The main argument against such courts has been that specialized courts are too narrow, too easily captured by one side or the other. They fail to allow for

percolation. A further argument is that such courts would really do little to reduce the burden of the regional circuits or the Supreme Court since the cases involved are relatively small in number and the conflicts involved are relatively few.

#### C. Panels in the Supreme Court

The Supreme Court has always sat as an appellate unit. The Constitution refers to "one Supreme Court." Yet it is arguable that in non-constitutional cases, the Court could be formed into panels. Such a mechanism would probably require a "safety valve" in order to withstand scrutiny. The valve would be further certiorari review before the whole court. This system (if involving panels of three) would theoretically triple the Court's ability to resolve conflicts. However, it might in fact attract more certiorari petitions. The government might be more willing to take a conflict to a three-justice panel than to the full court. In addition, it is unclear what the attrition rate would be. It may be that most parties who lost before three justices would seek plenary review in which case, the reform might involve more effort than the current system.

#### 5. Conclusion

There are a significant number of intercircuit conflicts and that number will continue to rise. However, it is a value judgment as to whether those conflicts represent substantive differences in any great number. Even if they do, it is possible that one of the non-structural methods described (or some combination of them) might significantly reduce the number of such conflicts and thus add clarity to the law and reduce the burden to the Supreme Court.

It should be noted that this paper does not deal with "attitude" conflicts. These exist where individual circuits exhibit strongly differing predispositions in certain types of cases. Thus, prior to the creation of the Federal Circuit, it was well understood that three circuits were openly friendly to patent holders seeking relief. Similarly, the Virginia Tax Review article mentioned above indicates that the reversal rate in tax cases runs from 3.2% in one circuit to 65% in another and the government has long felt that some appellate forums were more sympathetic to taxpayers than others.

Such attitude conflicts are an inherent part of the "percolation" process and no method of resolving such situations seems possible or perhaps even desirable.

## Alternative Mechanisms

When the caseload crisis began in the federal appellate courts in the late 1960's, experiments were begun to manage the growing caseload. These experiments have since become institutions. Such methods as elimination of oral argument, unpublished opinions and central staff are familiar to all who have worked in or practiced before appellate courts.

These efforts have succeeded over two decades in allowing the circuits to handle many more cases per judge than they had previously handled. While these changes have enabled courts to handle greater quantities of cases, concerns have been raised about their effect on the quality of justice. There has been less process in more and more cases. Initially, the reduction in process was probably a good thing. Frivolous cases were once handled with all the process of major constitutional challenges. There is a growing sense, though, that process has been reduced as much as it can be without harming essential aspects of justice.

Yet, as caseload continues to rise, appellate courts must of necessity reexamine the way in which they do their work. In order for the appellate courts to handle their existing caseload they must do one or more of five things: reduce caseload, reduce process, add judicial resources, transfer functions to non-judicial resources, or delay decisions.

The first option (reduction of caseload) is beyond the scope of the subcommittee's work. The third option (addition of judicial

resources) is problematic because it is possible that the appellate system is not capable of efficiently adding more judicial resources and because the political climate has been unfavorable for such additions for many years. The fifth option (delaying decisions) is generally regarded as unacceptable.

This paper, therefore, will concentrate on the two remaining options: reduction of process and transfer of functions to non-judicial resources. It should be emphasized that none of these options is a "magic bullet." There is no proposal in these categories which would eliminate the problems of the appellate courts. These are incremental steps which promise only incremental gains. They also carry costs, both in monetary terms and in terms of the quality of justice.

Since reduction of process and transfer of functions are often related (as when actions usually taken by a judge are transferred to a non-judge) the two options are considered together below.

Appellate processes impacting on the efficient operation of the courts (as opposed to those which impact primarily on counsel) can be divided into six categories: motions practice, pre-argument preparation, oral argument, conferencing, opinion writing, and post-decision motions. There are possibilities of savings of time in each instance. But, again, it must be emphasized that these savings are slight and carry costs with them.

#### A. Motions Practice

The strongest argument that can be made for appellate magistrates is in motions practice. The great majority of non-



dispositive motions could be done by others. Many are now done by clerks of court but there are difficulties with that system. The clerk often and properly has ex parte contacts and the clerk is not chosen for adjudicative skills, but managerial ones.

In addition, many motions would be more quickly resolved if hearings could be held. Emergency motions often come with little information or many unanswered questions. Contempt motions demand factual findings. Attorney disciplinary proceedings have similar needs.

There are some savings in transfer of non-dispositive motions and there are relatively few risks. Some level of dissatisfaction with staff decisions could be expected, but this ought to be slight and not very burdensome.

#### **B. Pre-argument Preparation**

There are two primary tasks involved in the pre-argument process: the reading of briefs and the preparation of bench memoranda.

The time spent reading briefs could be reduced by reducing the size of briefs. However, doing so across the board would lead to inadequate briefing in some cases and an increaser in motions for longer briefs in other cases. If cases could be categorized early in the appellate process and different brief lengths applied to each, the problems mentioned might be avoided. However, such categorization remains a subjective matter. An experienced staff attorney can probably divide cases into "easy, average, or difficult" with substantial accuracy, but then that person would

not be free to write draft opinions. Another alternative would be to sharply limit brief length by rule (15 pages may be reasonable) and have motions for longer briefs granted or denied by staff.

Bench memoranda are not universally used. Many judges prefer other methods of preparation. It is unclear, then, how much time may be saved in the area. Some state courts have staff prepare a single bench memorandum for the panel. If all three judges had previously had such items prepared by clerks, time equivalent to that of two law clerks' efforts would be saved. But the gain is slight. One rarely hears that law clerks are short of time. It is judges who are pressed. Moreover, the slight gain comes at a cost of homogenized bench memoranda--a bureaucratization of the process that may well be unacceptable even if resulting in significant gains.

### C. Oral Argument

There is probably a consensus that little more can be done to reduce oral arguments. Arguments are now had in less than half the cases. There are certainly still oral arguments that are a waste of time, but these are very hard to predict. In a difficult case with well written briefs, it is not unheard of to have two attorneys who are utterly unhelpful in oral argument. In an apparently weak case, skilled counsel have established a much stronger position during argument. The success rate in the predictions necessary to further reduce the level of oral arguments is not likely to be great and the effort involved would be significant.

Nor is there much room for reducing the length of arguments. Most circuits operate at a minimum level of argument as it is.

#### D. Conferencing

In theory conferencing could be eliminated. The three judges could simply vote and the writing task assigned administratively. Yet such a change, while saving some time initially, would fundamentally alter the appellate process. The process is intended to be deliberative not electoral. When judges do not exchange views after argument then the opinion that follows is likely to require more alterations than currently.

#### E. Opinion Writing

Reasoned opinions are the hallmark of appellate courts. As the de facto final review they are accountable only to the extent that explain their reasoning. While it is undoubtedly true that a significant percentage of opinions add nothing to the law, they do provide a basis for holding the court accountable. There have been significant reductions in the proportion of cases decided by reasoned opinions. Further reductions would be difficult to justify.

#### F. Post-Decision Motions

Appellate judges nearly universally describe an increase in the number of en banc requests or requests for rehearing. Such petitions may have increased because of a sense that the law is less clear or less stable or because attorneys are becoming more

willing to exercise a free option.

Placing a filing fee on rehearing requests (or just en banc requests) might reduce the inflow of such petitions, though in forma pauperis cases would still have a free chance at another hearing. The effort is probably worthwhile but the gains are likely to be marginal.

One other option for more efficient mechanisms is overarching-reducing panel sizes to two. The overwhelming majority of appellate opinions are unanimous. Moreover, and candidly, one hidden result of the caseload explosion is the increase in deference paid to the judgment of the writing judge. The judges have adjusted to the crisis by conserving time for those cases in which they have the highest responsibility. Recognizing this fact by reducing panel sizes to two would save a third judge from sitting in oral argument and reviewing motions and opinions in a great number of cases. The change would provide a 50% increase in appellate capacity (reduced by the number of cases in which a tiebreaker had to be brought in).

The system would require Congressional approval. In 1982 Congress was concerned about two judge panels in the Ninth Circuit and mandated panels of three. The Congressional concern focused on the fact that the court had proceeded to alter a traditional feature of appellate structure without Congressional consideration of the ramifications of the change.

There is a cost involved. Two judge panels reduce the deliberative nature of the proceedings. In the great majority of

cases this would make no difference. In some cases, though, it would change the outcome.

This last cost can be reduced by other mechanisms. First, the rule could require a three judge panel on motion of either party or a judge. Second, the norm could be three judges, but counsel wishing a quicker hearing and opinion could move for a two judge panel. These options effectively allow counsel to decide whether their case is appropriate for reduced deliberation.

Of all the options discussed only the two judge panel option offers noteworthy savings at costs that, arguably, are low. It presents a gain in net judicial resources with no financial impact and without causing other negative results such as increased levels of conflicts.

# **Models for Structural Change**



## 1. An Elaborate Intercircuit Panel

### Background

Creating a new level of intermediate court is not such a new idea.<sup>1</sup> There have been several proposals considered over the years to expand the vertical structure of the federal courts by creating a new level of appellate review between the existing courts of appeals and the Supreme Court.

A report published in 1968 under the auspices of the American Bar Association focused on the burgeoning federal appellate caseloads: Accommodating the Workload of the United States Court of Appeals.<sup>2</sup> The 1968 ABA report recommended various intramural reforms to improve docket efficiency and endorsed a sequential response to docket growth. Adding circuit judges should be preferred over splitting circuits; organizing larger circuits into subdivisions would accommodate larger dockets and more judges; circuit splitting might become necessary; the Supreme Court eventually would require some assistance by the creation of regional panels of the courts of appeals or subject matter appeals courts or eventually some national court of appeals. The form that national court might take was left quite indeterminate. Much of this scenario has come to pass.

Commissioned by the Federal Judicial Center, a study group of jurists, attorneys and scholars, popularly known as the Freund Committee, published a

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<sup>1</sup>See Dumbauld, A National Court of Appeals, 29 GEO. L.J. 461 (1941); Pope, The Federal Courts and a Uniform Law, 28 YALE L.J. 647, 651 (1919).

<sup>2</sup>AMERICAN BAR FOUNDATION, ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS: REPORT OF RECOMMENDATIONS (1968).

report in 1972 recommending the creation of a national court of appeals.<sup>3</sup> The proposed new court, staffed by circuit judges sitting for staggered terms, would have screened the Supreme Court's docket, first, culling out about 500 cases from which the High Court would select 150-200 for full decision, and, second, deciding itself cases involving intercircuit conflicts. This proposal went nowhere legislatively, but the hostile reaction set some limits to permissible debate.

In 1975, the congressionally-created Commission on Revision of the Federal Court Appellate System again recommended a new national court with jurisdiction between the courts of appeals and the Supreme Court.<sup>4</sup> The Hruska Commission, as it was popularly called, proposed that the new court be staffed with permanent Article III judges and would decide cases on reference from the Supreme Court and by transfer from the existing regional courts of appeals, and would be subject to review in the Supreme Court. That same year, the Advisory Council for Appellate Justice, an independently organized non-governmental panel often referred to as the Rosenberg Study, likewise recommended the creation of a new national court with jurisdictional rules to be established by the Supreme Court within congressionally designated outer limits.<sup>5</sup>

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<sup>3</sup>Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 (1972).

<sup>4</sup>Commission on Revision of the Federal Court Appellate System, Structure and Internal procedures: Recommendations for Change, 67 F.R.D. 195, 237-47 (1975). See also The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change, 62 F.R.D. 223 (1973) (recommending various reforms for the courts of appeals, including splitting the Fifth and Ninth Circuits).

<sup>5</sup>See Rosenberg, Enlarging the Federal Courts' Capacity to Settle the National Law, 10 GONZAGA L. REV. 709 (1975). Other contemporary studies provided additional fora for debate over the need for such a court and consideration of its necessary features. See, e.g., Department of Justice Committee on Revision of the Federal Judicial System, The Needs of the Federal Courts (1977); Hufstедler & Nejelski, ABA Action Commission Challenges Litigation Cost and Delay, 66 A.B.A.J. 965 (1980).

Not much happened legislatively beyond a few sporadic hearings, although the caseloads continued to grow and the untoward consequences seemed to worsen, prompting Chief Justice Burger to endorse a then languishing 1983 proposal to create an experimental intercircuit panel.<sup>6</sup> The ICP would have been composed of one judge from each circuit, designated for part-time service for a brief term, who would sit in nine judge panels with four alternates. Various ways of designating these judges were considered, including selection by the Chief Justice or the Supreme Court and election by the circuit judges. The offered compromise would have created a temporary court for a five year trial period. At the time, Justices White, Rehnquist, Powell, and O'Connor supported the Chief Justice's idea.

Next came the New York University Supreme Court Project, conducted under the tutelage of Professors Samuel Estreicher and John Sexton.<sup>7</sup> This study took advantage of the inertia of the pending proposals to conclude that the ICP was an unsuitable remedy. More modest reforms in Supreme Court procedures for selecting and deciding cases would be sufficient, although the authors preferred other less desirable alternatives--modification of the rule of four, reforming the en banc courts, and more specialized courts--over the creation of a new court.<sup>8</sup>

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<sup>6</sup>Burger, The Time Is Now for the Intercircuit Panel, 71 A.B.A.J. 86 (April 1985). See also Burger, Annual Report on the State of the Judiciary, 69 A.B.A.J. 442 (1983).

<sup>7</sup>S. ESTREICHER & J. SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS (1986).

<sup>8</sup>See also Report of the A.B.A. Standing Committee on Federal Judicial Improvements, The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth (1989) (The Report did not discuss the proposal for a new national court; over dissent, the Committee recommended further study of the extent of disuniformity, limited en banc procedures, more reliance on screening devices, and assignment to panels by subject matter within the circuits).

## Assumptions

Before contemplating the form that any proposed new national court should take, the question of need is best mentioned first.<sup>9</sup> Much of the Commentary on the Supreme Court's workload regrettably has degenerated into an argument about how hard the justices are working and how effectively. The debate over intercircuit conflicts--how many there are and even whether they are good or bad--has generated more heat than light. This paper is based on two assumptions. First, the Supreme Court is faced with an unreasonably heavy workload burden which is beginning to jeopardize the performance of the High Court. While some believe that the problem has not reached such a crisis proportion as to justify far-reaching reforms, most everyone would admit that such a crisis is imminent. Second, the present federal court structure lacks sufficient capacity for achieving a satisfactory measure of uniformity in our national law. There are nearly as many suggestions of what to do about this, however, as there are those who agree with this second proposition.

## A Proposal

Since the one Court of nine justices cannot meet the needs of the system, establishing another level of court is an obvious solution to these two problems. There seems little chance of any particular design being implemented unless and until there is a consensus in the Third Branch and in Congress: first, that something dramatic needs to be done and, second, just what that should be. There are any number of designs available with various features about which knowledgeable persons may reasonably disagree.<sup>10</sup> What follows are some alternative features of the proposed new court.

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<sup>9</sup>See generally Baker & McFarland, The Need for a New National Court, 100 HARV. L. REV. 1400 (1987); Stern, Remedies for Appellate Overloads: the Ultimate Solution, 72 JUDICATURE 103 (1989).

<sup>10</sup>See, e.g., Note, Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court, 97 HARV. L. REV. 307 (1983).

(1) Designation. The name or designation given to this new court may be significant. "National Court of Appeals" is freighted still with hostility against the Freund Committee's plan. "Intercircuit Panel" connotes the temporary panel urged by Chief Justice Burger. "In banc intercircuit conference" per Justice Callow's proposal conjures up a truncated jurisdiction. In deference to the conflicting attitudes, here the new court will be called simply "Court X."

(2) Jurisdiction. The constitutional requirements of case or controversy with all doctrinal gloss would apply, of course, to Court X as an Article III court. Statutorily, the final judgment requirement would also be a necessary jurisdictional feature. The more interesting jurisdictional questions relate to appellate flow: Court X's docket should come from whence and go whither?

The Supreme Court ought to be empowered to refer cases to Court X. This would preserve, and not add measurably to, the Supreme Court's screening authority over its own docket. Court X ought to be obliged to decide these referred cases. Additionally, it may be appropriate to authorize the courts of appeals--whether only en banc or three-judge panels as well is uncertain--to certify appeals to Court X, although Court X might be empowered to decline jurisdiction. It would be a more profound structural change, without apparent added justification, to allow parties to petition Court X directly for review of a panel or en banc decision. A most profound consideration of federalism, and a likely damning consideration of practical politics, would be raised if Court X were given jurisdiction to hear appeals from state supreme courts. The Conference of Chief Justices opposes jurisdiction to review state courts in any federal court but the Supreme Court.

A central question of jurisdictional design is whether Court X should be limited to hearing conflicts or should be authorized to hear other appeals which raise important questions of national law. The most modest jurisdiction base



that would justify establishing the new court would be a docket originating with references by the Supreme Court. To limit jurisdiction to circuit conflicts might unnecessarily send the Supreme Court and the new court on a kind of jurisdictional snipe hunt for "square" or "direct" conflicts. (Recall the jurisdictional experience of the three-judge district courts.) Related to this is the issue whether conflict review ought to be limited to issues of statutory interpretation or might include constitutional issues.

Decisions of Court X would be binding on all other courts, unless the Supreme Court manifested disagreement. Presumably, the Supreme Court would have statutory discretionary authority to review the decisions of the new court. That the Supreme Court would review an excessive number of cases it had referred for decision, and thus frustrate the reasons to create a court to reduce its workload and to provide additional national appellate capacity, cannot be assumed.

(3) Size. Reformers have suggested a new court composed of as many as fifteen to as few as five judges. The court must have more than three judges, the court of appeals panel complement. There should not be so many judges that the court impersonates the diseconomies of scale of the large en banc courts, which are authorized by statute to sit in subsets of judges once the bench holds fifteen. Even numbers are not permissible now that judges are all legal realists: that leaves 5, 7, 9, 11, 13 or 15 chairs to fill. Just how many depends on several related features. For example, there should be more chairs if Court X will sit in panels larger than 3. A rotating panel system, however, would counteract the chief purpose to achieve greater uniformity and certainty in the law. If selection is made representational by each existing circuit, there should be 13. Some provision for alternates might be made, in case of recusals or disqualifications. A quorum should be one more than a majority of the authorized judgeships.



(4) Selection. Selection is the most problematic feature. Permitting one President to appoint an entire national court for life is the Article III paradigm, but contemporary politics do not have much in common with George Washington's day. The designation of current circuit judges would avoid that difficulty but would create other difficulties. Who should designate the judges? The Supreme Court? The Chief Justice alone? The Judicial Conference? The judicial council in each circuit? The answer depends on various considerations. Selection by the Supreme Court would add a weighty responsibility and might be likely to increase internal tension. If the Chief Justice alone was to designate judges, that would give one individual a great deal of power to shape the second most powerful body in the same branch of government. Giving the appointment power to the judicial conference or the judicial councils might unduly politicize those bodies and increase dissension, and, at bottom, would increase arbitrariness both apparent and real, because these randomly constituted groups could not be expected to mirror the Article III selection process. One possibility is to make service on the new court as automatic and mechanical as the current statute for selecting the chief judge of the circuit. This provision might also set a term of years in such a manner as to regularly rotate part of the membership. After all, these judges already have once been nominated by a President and confirmed by a Senate. There are, however, obvious but telling arguments to rely on this traditional selection process to select permanent new judges for Court X.

(5) Term. While some early proposals, notably that of the Hruska Commission, were to create a permanent new court, more recent proposals endorsed by Chief Justice Burger would create an experimental panel subject to an automatic "sunset" provision unless Congress reauthorized it. Establishing the new court on a temporary basis would build-in complications, the most serious being that its supervisory authority over the courts of appeals inevitably would

be weaker. Because even a permanent inferior federal court can be abolished, after a reasonably long period of operation and study Congress could reevaluate the need and efficacy of Court X.

(6) Miscellaneous. There are any number of other issues of detail necessary to create a Court X. It may be prudent to recognize that these depend, in large part, on how the above enumerated decision points are handled. A nonexhaustive list of subsidiary issues about any proposed new national court would include:

- Should the court sit in panels or only en banc?
- Should rehearings be allowed?
- Should the new court have the power to overrule its own precedents?
- Should the court be given discretion to decline to decide a case otherwise within its jurisdiction?
- Should senior circuit judges also be eligible to serve?
- How long should a judge's term be, if it is less than lifetime?
- Where is the most appropriate location?
- What sort of delegations are appropriate to allow the new court to organize internal operating procedures, local rules, admissions of attorneys and related administrative arrangements?
- What provisions are needed for budget and staff?
- How should disciplinary complaints against the judges be processed?
- How best can the new court be evaluated?

Finally, the persistent opposition of most circuit judges ought to be addressed. Admittedly, staffing the new court with existing circuit judges would reduce the capacity of the overburdened courts of appeals by an increment of one judge, but that is an argument against that selection method or in favor of creating additional circuit judgeships. So long as the opposition is based on the increase of reviewability, a basic purpose besides aiding the Supreme Court, it may be readily discounted. The more general worry is that the authority and prestige of the courts of appeals and then circuit judges will be diminished by establishing a new court (even if composed of circuit judges) between the courts of appeals and the Supreme Court. Judge Clement F. Haynsworth of the Fourth Circuit once responded:

There is enough prestige in a circuit judgeship, however, to suffer no appreciable dilution when courts like mine are enlarged to meet rapidly rising caseloads. In any event, that kind of concern for personal prestige, or the prestige of one's office, can not be permitted to preclude accretions to the system which are necessary to its efficient functioning.\*\*\* If [the system] needs enlargement, as I deeply believe it does, any reluctance on my part to look up to sixteen judges above me rather than nine should carry little weight. For my part, I am concerned with the system and its needs and I strongly feel that meeting them will in no way diminish the prestige of my office, or that of any member of any of the present courts of appeals.<sup>11</sup>

In conclusion, the ultimate question is not whether the proposed new court will present some problems or might have some disadvantages, but whether it might aid the Supreme Court by lessening workload and whether it might benefit the federal court system<sup>y</sup> by increasing the uniformity and coherency of the national law. The controlling question, therefore, is not how the court should be described but whether any new national court is needed.

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<sup>11</sup>Hearings Before the Committee on Revision of the Federal Court Appellate System, 94th Cong., 1st Sess., Vol. II, p. 1328 (1975). See also Markey, On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand, 33 S. DAK. L. REV. 37L (1988).

## Specialized Courts

Specialization is a means used in many fields to maximize the impact of available resources. In courts, particularly in Article III courts, specialization is looked at with near or actual disdain. While the practice of law has become increasingly specialized and while courts will overturn criminal convictions because of an inadequate defense in cases where defense counsel lacked criminal experience, the courts themselves vigorously resist efforts at subject matter specialization.

The arguments raised against specialization are really two. First, a specialized appellate court in an area such as tax will end the debate on any issue with its first opinion. If there were a national court of tax appeals there would be no more than one appellate case on any emerging issue of tax law because the first decision would be decisive. Opponents argue that there is much value in "percolation" of difficult issues. But, of course, most issues in tax and elsewhere are not all that difficult and the value of decisiveness in some areas outweighs the marginal and possibly speculative gains of percolation.

Second, there is a danger that specialized courts will be "captured" by one side or another. This argument dates back to the experience with the Commerce Court at the beginning of this century. That court was perceived as being captured by the railroad interests and was quickly dissolved by Congress. Similarly, some administrative agencies have been described as captured. Indeed, at various times in recent years the NLRB has been described as

captured by both labor and management.

However, even a captured court would decide the great majority of cases in the same way as one that had not been captured. Moreover, the problem presented by capturing varies somewhat with the subject matter involved. A Court of Constitutional Appeals captured by some fringe group presents a dire problem because altering the outcome of its decisions might require amending the Constitution. A pro-government or pro-taxpayer Court of Tax Appeals may have its decisions reversed by Congressional or even administrative action.

Percolation and capturing may or may not be legitimate issues. But a fair question as to this (and all other proposals) is "what good will it do?" A Court of Tax Appeals would remove only 2% of the cases from the regional circuits. The Ninth Circuit would lose slightly more than 100 cases. The incoming tide of new appeals would quickly wash away such a tiny gain.

A Court of Administrative Appeals would remove more cases, the exact number being dependent upon what jurisdiction was given to such a court. But assuming that such a court would primarily hear benefits cases (such as Social Security Disability cases), the number of cases removed would be around \$\$\$\$\$. While greater than the number of tax cases, this change is also not very significant especially since the Social Security cases are universally regarded as quite easy to decide.

A stronger justification for specialized courts is that they provide greater uniformity. This is seen as being particularly desirable in "technical" areas such as tax, where the law is often



artificial and it seems crucial to have nationally consistent treatment.

Yet there is some debate about how often conflicts arise in the tax area. A forthcoming law review note indicates a fairly high number of tax conflicts (though it appears to count conflicts in an odd way; one circuit out of line with eleven others equals eleven conflicts). The Tax Division at the Department of Justice insists that the number is quite low and has promised to provide figures.

Even if the number were a high one, it does not necessarily mean there is a great problem. Congressional tax committees probably follow developments in the courts better than most other committees do. Tax laws are frequently rewritten and court decisions are frequently reversed in that process. Congress is an awkward forum for resolution of conflicts, but it is a forum nonetheless.

The arguments for and against specialized courts are more fully set forth in the recent Report of the American Bar Association Standing Committee in Federal Judicial Improvements. That report also presents a variation on the specialized court theme: specialized panels.

The concept is that in specific areas of the law (such as trademark) all appeals would go to a pool smaller than the entire circuit. A panel from that pool would hear any trademark case and presumably would reach a high level of consistency of doctrine. The broader the area of specialization the more problematic and less useful the proposal becomes. For instance, a "criminal" pool would



have vast number of cases and would not be much more likely to achieve consistency than would the circuit as a whole. Thus, while specialized panels may have some usefulness in narrow areas of the law, they do not hold much promise as a major aid in the current crisis.

## Regional Intercircuit Panels

**Summary:** In this structure there would be several intercircuit panels, established regionally (though, in theory, these could be established by subject matter instead of by geography). These panels could be comprised of judges from within the constituent circuits or the judges could be selected for the intercircuit jurisdiction alone. The panels would be comprised of more than three judges (for purposes of this paper panels are assumed to consist of 5 or 7 members). The options for number of panels, selection of the panels, sources of cases, binding nature of the panels' decisions, and the effects on the structure of the existing circuits are discussed below.

A regional intercircuit panels structure would be designed to resolve intercircuit conflicts while simultaneously permitting some level of percolation to continue. As such it sacrifices the rapid and certain resolution of intercircuit conflicts thought to be gained by a single intercircuit tribunal in order to allow some broader level of consideration of complex and divisive cases.

**Number of Panels:** There are currently 168 statutory appellate judgeships. Of these, 28 are in the Ninth Circuit. Since the multiple intercircuit panels concept assumes that at least two circuits would be involved and it seems logical that the circuits be adjacent to each other, the minimum constituent group of an

intercircuit panel would be dictated by the number of judgeships in the Ninth plus those in its smallest adjacent circuit, the Tenth. This number is ###. If the constituent groups of the intercircuit panels are to be roughly the same size, then this dictate suggests that there be four such panels. A rough breakdown, assuming the existing circuit structures remain unchanged, would have the panels distributed as follows: the Ninth and the Tenth; the Sixth, Seventh and Eighth; the Fourth, Fifth and Eleventh; and the First, Second, Third and the District of Columbia. These panels would supervise groups of ##,##,## and ## judges respectively.

It would be possible to have fewer than four panels, but each reduction substantially reduces the percolation benefits and increases the logistics problems.

**Selection of Panels:** There are two methods of selecting panels for an intercircuit tribunal: random selection and criteria based selection.

Random selection would have the members of the panel selected by a random draw from among the existing circuit judges; literally pulling names from the hat. Random selection only makes sense if the intercircuit tribunals were to be ephemeral in nature, convening on a case-by-case basis or for a term of short duration. Judges who had served on the panel whose decision was being reviewed could be excluded or not.

Criteria based selection would ~~require~~ developing some criteria, probably seniority, for selection of the members of the panel. It has the advantage of providing panels specifically

selected for the task and two disadvantages: first; any criteria, even seniority, is controversial since anyone looking at the plan could determine the present and future makeup of the panels and thus focus on individuals rather than structure. Second, relatively stable panels mean that some small group of judges would be given long-term enhanced workload and status. The workload of the circuits would not be evenly distributed.

**Sources of Cases:** There are two methods for assigning cases to these panels. First, a petition system could be established in which a party would petition for intercircuit panel review. The second method would involve automatic jurisdiction in the panel when a three-judge panel noted a conflict with the decision of a panel of any other circuit. A variation on this second option would be to allow the intercircuit panel to dismiss a case over which it had jurisdiction when it found that the conflict was not significant.

Both options involve a significant problem. The intercircuit panel would be a court of limited jurisdiction. That jurisdiction would be based on the existence of a "conflict." Yet that term is very hard to define. Under either model, there is a substantial possibility that the intercircuit panels would face constant wrestling with the question of jurisdiction.

The petition system involves another problem. If the intercircuit panel only hears those cases in which ~~a party seeks~~ its review, then it will not hear all cases of intercircuit conflict since the losing party may not always be motivated to seek

further review. This problem represents a systemic loss. The justice system as a whole, as well as the individual litigant, that benefits from the elimination of intercircuit conflicts. Thus, a case can be made for review in the intercircuit panel independent of the wishes of the parties.

Automatic review also presents difficulties. In cases that are bound for the Supreme Court no matter what (such as sentencing guidelines), automatic review in the intercircuit panel provides another hoop to jump through and a consequent delay in resolution.

**Binding Nature:** A major question is the precedential effect of an intercircuit panel decision. Clearly it would be binding on its constituent courts. Clearly, also, it would be influential outside the constituent courts. But it seems obvious that it ought not to be binding outside its constituencies. If it were, then the percolation benefit would be lost entirely and one might as well have a single intercircuit tribunal.

**Effect on Circuit Structures:** It is possible to combine the creation of intercircuit panels with the dividing of the current 13 circuits into 20 or more. Once a method is devised for resolving intercircuit conflicts, the arguments against multiplication of the circuits are greatly weakened. The current 12 regional circuits could become 20 "divisions." These divisions would have no more than 9 judges. The result would be an enhanced sense of collegiality and an enhanced predictability of outcome within each division.

August 18, 1989

To: Subcommittee on Structure, Federal Courts Study Committee  
From: Daniel J. Meador  
Re: Reorganization of the Federal Intermediate Appellate Courts

Pursuant to the request made to me at the subcommittee meeting on July 30, I am submitting herewith a plan for reorganizing the federal intermediate appellate tier. The plan is designed to enable the federal judiciary to deal more effectively at the appellate level with the anticipated continued increases in litigation and consequently in the number of appellate judges.

William Faulkner once said that a writer is an inveterate thief. He steals ideas from wherever he can find them, like a carpenter searching around for a board or a plank here and there that will fit his needs and taking it if it suits. Thus, this plan draws on ideas set forth in Judge Levin Campbell's letter, Paul Carrington's letter, and various writings over the years, along with some ideas of my own. It is an effort to put together in a balanced way the various ideas, taking into account the views that have emerged in the subcommittee discussion. It could no doubt profit from further refinement and collective deliberations; it is a draft for discussion and is not put forward as a finished product. It does represent an effort to take the various concepts and ideas relating to appellate structure and to translate them into concrete, operational forms.

Several assumptions underlie this plan, including the following:

1. Federal appellate business is likely to continue to grow, whatever may be done about district court jurisdiction.



2. New federal appellate judgeships will be created and indeed must be created if any semblance of the traditional judicial process is to be retained.

3. Growth in the number of judgeships and in the volume of appeals will render the Supreme Court decreasingly able to maintain nationwide harmony in federal decisional law.

4. For several reasons the federal appellate structure should retain some regional components; it is probably not feasible, politically and otherwise, to centralize all federal appellate business.

5. Some federal appellate business is already organized on a non-regional basis, and it is feasible and desirable to enlarge the range of appeals adjudicated in that way in order to increase the capacity of the judiciary to maintain nationwide decisional harmony.

The plan set out below seeks to blend the regional features of the federal appellate judiciary with an enlarged non-regional feature, creating an appellate structure that makes it possible for appeals to be adjudicated within a reasonable time with a heightened guarantee that the cases will receive the direct attention of the judges themselves without undue reliance on law clerks and staff attorneys. The plan seeks also to move away from the "law of the circuit" (resulting from the existing balkanized structure) and to put in place a system that will apply and interpret the "law of the United States."

#### **A Plan for Reorganizing the Federal Intermediate Appellate Tier**

Congress should enact a statute creating the "United States Court of Appeals." This would be the sole federal appellate court between the district courts and the Supreme Court. It would consist of all existing 168 U.S. circuit judgeships, plus all senior circuit judges. All existing appellate jurisdictions in any of the present U.S. courts of appeals would be vested in this new court. Existing circuit lines would be abolished.

This single, nationwide U.S. court of appeals would function through three types of divisions--numbered divisions, lettered divisions, and named divisions.

A. Numbered Divisions. The numbered divisions (e.g., Division 1, Division 2, Division 3, etc.) would consist of nine judges each and would be spread geographically across the United States. These divisions would provide appellate review for the great mass of district court judgments, thus maintaining the concept of regional review. The jurisdiction of the numbered divisions would extend to all matters except those reviewable by the named divisions, to be described below. The jurisdiction would include diversity cases, criminal cases, and a wide variety of constitutional and statutory cases.

Each numbered division would be headed by a chief judge, selected in the same manner that all federal chief judges are presently selected. The division would sit in rotating three-judge panels. Each judge would be authorized two law clerks and each division would be authorized no more than five central staff attorneys. It is contemplated that a division would hear and decide no more than approximately 1,800 appeals annually. If the volume begins substantially to exceed that amount, a new division of nine judges would be created. The primary mission of a numbered division would be to provide expeditious review of district court judgments to ensure that substantial, prejudicial errors had not been committed in the district court proceedings. A very high percentage of these divisions' decisions would be unpublished. Although internal screening procedures would be permitted, it is contemplated that oral arguments would be allowed in a much larger percentage of appeals than is now the norm. The nine judges on each division would be drawn from judges with home stations in at least two contiguous states, including the state containing the district court whose judgments are under review.

B. Lettered Divisions. There would be five lettered divisions (Divisions A, B, C, D, E). Their mission would be to provide review on a discretionary basis of the decisions of the numbered divisions. These lettered divisions would be spaced geographically across the United States, each embracing roughly the same number of numbered divisions. A lettered division would correspond roughly to the existing en banc procedure in a federal judicial circuit. That is, it would be available to provide review of a numbered division decision in order to eliminate conflicts between or among the numbered divisions within its jurisdiction and to provide authoritative decisions on important issues of federal law. Most of its opinions would be published. Decisions of the lettered divisions would be subject to review by certiorari in the United States Supreme Court on the same basis, and for the same reasons, that Courts of appeals' decisions are presently reviewable in the Supreme Court.

Each lettered division would consist of seven judges. The division would typically sit en banc, although it should be authorized in its discretion to sit in a panel of five. The division would be headed by a chief judge, selected in the same manner as federal chief judges are currently selected. Each judge would be authorized two law clerks, and the division would be authorized five central staff attorneys. It is contemplated that a lettered division would review only a small percentage of the decisions of the numbered divisions. A decision of a numbered division denied review in the lettered division would be final and not subject to review by the Supreme Court.

C. Named Divisions. The named divisions would provide the non-regional, nationwide appellate review of district court judgments and administrative agency orders in certain specified types of cases. Non-regional review presently provided by the Federal Circuit and TECA would continue as part of this non-regional jurisdiction. New categories of cases would be added to those. The divisions listed below are those suggested for an initial design. The categories of

cases listed for each could, of course, be expanded or contracted, and other named divisions could be created to accommodate other categories of cases. The number of judges on each lettered division would depend upon the volume of business assigned to that division. Typically a named division should consist of at least seven judges but not more than fifteen. The division would be headed by a chief judge selected in the same manner as all other federal chief judges are selected.

Administrative Division. This division would have jurisdiction to review orders of the NLRB, FTC, FCC, the Immigration and Naturalization Service, and possibly others. Seven or nine judges would probably be adequate initially.

Commercial Division. This division would have jurisdiction to review all district court judgments in patent infringement cases (presently part of the federal circuit jurisdiction) and in actions under the antitrust laws and perhaps certain other pieces of the present federal circuit jurisdiction; it would also have jurisdiction to review judgments of the Court of International Trade. Nine judges would probably be adequate initially.

Revenue Division. This division would have jurisdiction to review all judgments of the Tax Court, judgments of the Claims Court in actions arising under the internal revenue laws, and judgments of the district courts in actions arising under the internal revenue laws. It would also have jurisdiction to review all criminal convictions in the district courts where the conviction is based upon a violation of the internal revenue laws. Seven judges should be adequate initially.

State Division. This division would have jurisdiction to review final decisions of the highest state courts involving a controlling question of federal law. In other words, this division would be assigned all of the jurisdiction now vested in the U.S. Supreme Court to review state decisions (including those of the District of Columbia Court of Appeals and the Supreme Court of Puerto Rico). This jurisdiction, like that of the present Supreme Court jurisdiction, would be entirely on

a certiorari basis. A division of nine judges would be adequate and appropriate, and the division should sit en banc to hear and decide cases, although in granting or denying certiorari it could operate under a "Rule of Four." This division would also have jurisdiction to review district court decisions in habeas corpus proceedings challenging custody under state law; this jurisdiction would continue to be on a certificate-of-probable-cause basis, and in deciding such cases the division could sit in three-judge panels. The Supreme Court would have jurisdiction to review this division's decisions by certiorari where the division had granted certiorari or a certificate of probable cause.

**D. Managing the U.S. Court of Appeals.** A unified, nationwide court of this sort would obviously be a much more complicated court to manage than any one of the existing federal appellate courts. It should have a chief judge who could appropriately be the Chancellor of the United States courts, if that position were to be created. Indeed, a major aspect of the projected Chancellor's responsibilities would be the management of this U.S. Court of Appeals. To assist the Chancellor, the court should have an executive committee of judges, composed of the chief judge of each of the lettered and named divisions. Under the above plan of organization, this would provide an executive committee of nine. The Chancellor and the executive committee would be the administrative head of the court, authorized to manage all of its internal affairs. The authority now vested in the Judicial Councils of the circuits would be transferred to the lettered divisions, thus creating a "Divisional Council" consisting of two judges from the lettered division, three judges serving on the numbered divisions within the lettered division's area, and three district judges serving within that geographical area. One magistrate and one bankruptcy judge could be added to the Divisional Council. (If the position of Chancellor is not to be created, the Judicial Conference could be authorized to appoint a chief judge from among the judges of the court.)



Such a restructuring of the intermediate appellate tier would require a new design for the composition of the Judicial Conference of the United States, inasmuch as the circuits would no longer exist. The Judicial Conference could appropriately consist of the chief judge of each lettered and named division (nine judges), two district judges elected by the district judges within each of the lettered divisional areas (ten judges), and the presently authorized two bankruptcy judges, plus the Chief Justice and the Chancellor.

E. Divisional Lines and Jurisdictions and the Assignment of Judges to Divisions. There are two ways in which territorial and jurisdictional lines could be drawn for the divisions. One would be by Congress in the statute creating the U.S. Court of Appeals. The other would be by rule adopted by the Judicial Conference of the United States. Arguments can be made for and against either of these arrangements. A good compromise might be for Congress to specify divisions initially in the statute that creates the new unified court, with authority thereafter in the Judicial Conference of the United States to redraw divisional lines and to create new divisions as the ebb and flow of appellate business might require. Placing this power in the Judicial Conference in relation to the regional elements of the system (the numbered and lettered divisions) might be less troublesome than placing such authority in the Judicial Conference in relation to the named divisions. Thus it could be that Congress would want to authorize the Judicial Conference to redraw regional lines but not to have such authority in relation to the subject matter jurisdiction of the lettered divisions. A good argument can be made, however, that once Congress establishes this unified court and its initial divisions, the system would be better served through the uncertain and changing future by empowering the Judicial Conference to redesign all divisions and to create and abolish divisions as business dictates.



All existing U.S. circuit judges and senior judges, upon enactment of a statute creating the U.S. Court of Appeals, would become judges of that court and not of any particular circuit. All judges appointed thereafter would be appointed as judges of the U.S. Court of Appeals without reference to division. It should be understood that in the course of a judicial career a judge would likely serve on more than one division and would be rotated among divisions from time to time. Power to assign a judge to a division should be vested in the Judicial Conference of the United States on recommendation of the Executive Committee of the U.S. Court of Appeals. Authority to designate a judge to sit temporarily on a division other than the one to which he is regularly assigned should be vested in the Chancellor or the Chief Justice.

Judges on this new and unified Court of Appeals could be denominated United States Circuit Judges. That is a title that has been in use for some 120 years, first for judges on the old circuit courts (courts of mixed trial and appellate jurisdiction), then later (after 1891) for the judges of the courts of appeals. Because of its familiarity and established usage, it might be the appropriate title to continue for judges on the reorganized appellate court. However, continued use of the word "circuit" in the title may tend to preserve some of the undesirable features of the circuit system that the reorganization is designed to replace. For that reason, it may be desirable to create another title for these judgeships, such as "United States Appellate Judge" or "United States Appeals Judge." Such a title would be more revealing and descriptive of the functions being performed by the judges who would sit on these various divisions of the unified court.

F. Concluding Observations. Although this plan may appear superficially to be radical, it is actually quite conservative in that it seeks to preserve those features of the federal appellate system that many lawyers and judges believe to be essential: sufficient judicial resources to permit expeditious resolution of appeals, individual judicial workloads that permit personalized attention

of judges to each appeal, judicial groupings small enough to permit collegiality among the judges, regionalized review of appeals where regional concerns are likely to be strongest, nationwide consistency and harmony in those fields of federal statutory law where the need for nationwide uniformity is greatest, and decreased pressure on the Supreme Court's finite capacity, thus better enabling it to perform its unique function as the final decisionmaker on questions of federal law.

Details, of course, remain to be worked out in order to put this plan into effect. For example, the federal judicial districts to come within the jurisdiction of each numbered division would need to be specified, as well as the numbered divisions that would come within each lettered division. Implementing this plan would also require additional judgeships (inevitable in any event), but I have not worked out the precise number. The shortness of time has prevented my developing these details. If the subcommittee is interested, perhaps the AO or Denis Hauptly could draft a suggested arrangement.

Any reorganization of the federal intermediate appellate tier adequate to meet current and projected conditions will necessarily involve significant changes from the existing system and will itself give rise to new questions and uncertainties, at least in its early stages. That is an inescapable price for necessary reform. It is reassuring, however, to keep in mind Hamilton's statement in the 92nd Federalist, addressed to a similar concern about the new government then being created: "Time only can mature and perfect so compound a system, liquidate the meaning of all the parts, adjust them to each other in a harmonious and consistent WHOLE."

## 2. A Single Unified National Court of Appeals

The idea of a single, unified national court of appeals has an alluring simplicity: eliminate altogether the geographical boundaries between the courts of appeals and consolidate them into one unified administrative and jurisdictional tier of intermediate court. Logically then there could be no such thing as an intercircuit conflict, of course, but the unified court seemingly would require some appropriate mechanism to deal with the equally logical inevitability of more numerous intracircuit conflicts among three-judge panels. From time to time, various commentators have considered this proposal.<sup>1</sup>

The unified model depends on a concept that there be a single United States Court of Appeals. All geographical circuits would be abolished, and presumably the Federal Circuit would be absorbed, as well. Professor Paul D. Carrington, a chief proponent of this model, believes that this would relieve the circuit judges of their preoccupation with maintaining the law of the circuit (an effort he discredits as misguided) and also would make more efficient use of judicial personnel. A unified model presents sophisticated organizational options for administering such a necessarily complex institution. This discussion relies on Professor Carrington's blueprint for dealing with the judicial diseconomies of

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<sup>1</sup>See generally Burdick, Federal Courts of Appeals: Radical Surgery or Conservative Care, 60 KY. L.J. 807, 812 (1972); Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 HARV. L. REV. 542 (1969); Rosenberg, Planned Flexibility to Meet Changing Needs of the Federal Appellate System, 59 CORNELL L. REV. 576, 591-95 (1974); Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?, 71 CALIF. L. REV. 913, 940-41 (1983).

scale, although not all his ideas are inherent in the model or self-evident. There are many possible variations on his theme. Professor Carrington's formulation includes "General Divisions," "Special Divisions," and a national "Administrative Panel" which presumably would resemble the present Judicial Conference.

Appeals would continue to be decided by three judge-panels. Three-judge panels, however, would be constituted from among "General Divisions," usually comprised of four judges from four different but proximate states. Thus there would be forty or more regular General Divisions. Active circuit judges would be assigned to General Divisions by a national Administrative Panel which would be chosen by seniority to serve for a substantial term of years. Some provision might be made for automatic rotation among General Divisions that prove too stable in membership (e.g., no change in membership for three years).

Each General Division would have jurisdiction to hear appeals from an appropriate number of specifically identified district judges. The district judges whose appeals were earmarked to a particular General Division would sit in one of the four states represented on the General Division. Although different General Divisions of the court of appeals would regularly review different district judges in the same district, still each individual district judge and the litigants in the case would have a fairly good idea of the appellate panel from the moment a matter was assigned to the trial judge. The argument is that any cost of greater perceived differences among trial judges in the same district, because they would be reviewed by different three-judge panels, would be offset by the benefit of the identifiable and stable appellate panel.

Appellate procedures would be characterized by greater orality. Indeed, the new appellate procedure in the typical appeal would imitate the English

tradition with an emphasis on oral presentations by the advocates and an oral decision, with assurance of disclosure of the reactions of each panel member, delivered from the bench without conference. The written opinion for the court, John Marshall's innovation of the nineteenth century, would no longer be the norm. Every effort would be made to take full advantage of modern technology, by experimenting, for example, with closed circuit televised hearings.

The operative assumption would be that only in a small fraction of the appeals would the three-judge hearing panel determine that a full written opinion would be necessary and appropriate. This determination might be made at the oral presentation just described. In these appeals, the hearing panel would be augmented to seven judges, as described below. The likely case for this augmented hearing would be an appeal raising a substantial issue of federal law, for example, a difficult issue of statutory construction. Only these augmented hearings would result in the published opinion produced in the Marshall manner, a conference of the judges, collegial deliberation, and extended revisions. With the exception, of a Special Division en banc rehearing below, these augmented panel decisions would be the law of the land, without expectation of further review in the Supreme Court, given their weight. Thus the current notion of the law of the circuit would be replaced.

Expansion of the hearing panel from three to seven judges in the one-of-the-court type appeals would come from the membership Assignment of a judge to a Special Division of the circuit by subject matter, would be supplementary to the assignment keyed to the identity of the district judge, and each active circuit judge would have a General Division assignment. Special Division

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assignments would last perhaps as long as eight years and would be made by the national Administrative Panel by some calculus to include preference, seniority, location, and lot. There might be some provision for rotation, one judge off/one judge on, each year, but the Special Divisions would be selected to assure substantial stability.

There would be a Special Division for each subject in which a substantial number of full opinions would be required, for examples: antitrust and related economic regulation, taxation, intellectual property, bankruptcy, government contracts, labor law, securities regulation, federal tort claims, federal crimes, federal civil procedure, federal criminal procedure, civil rights legislation, et cetera. Special Divisions could be created or abolished by the national Administrative Panel. These assignments might be analogized to committee assignments in the Congress which develop a particular expertise, along with a generalist's competence. Each Special Division would be expected to maintain a coherent body of law on its subject matter. The present en banc responsibility would be shifted to the Special Divisions which, if necessary, could sit en banc and review the augmented seven judge hearing panel.

This unified model, distinguished from the current system by greater orality and greater subject matter specialization, is designed to realize the ideal of an appellate system that is speedy, inexpensive, and just. Greater coherency in the national law is an important purpose behind this design. An effort to compromise the generalist court versus specialist court debate is much in evidence. Subject matter grouping of appeals, which would be of dubious worth within the present regional circuits, would offer substantial efficacy in dealing with a national docket of a national court. Intercircuit conflicts would be eliminated by definition. The likelihood of intracircuit conflicts



would be lessened, first, by the constancy of the General Division in less significant appeals decided orally in summary fashion and, second, by the expertise of the Special Division in augmented panels and the capability of en banc rehearing. The delay and cost of panel rehearing and en banc rehearing in the current system would be replaced by the augmented panel and Special Division en banc rehearing, presumably with comparable measures of cost and delay, but with an expectation for greater coherency in the law.

The most obvious critical response to the unified model is to condemn it as specialization of the federal judiciary. As has been suggested, however, this model is more fairly viewed as a compromise of that debate, which will not be rehearsed here. Other objections are more substantial.

First, each General Division, unrestrained by publishing an opinion in the run of the cases, is a potential aberration from the national law. This risk seems no different, however, from the current system of three-judge panels, subject to an altogether rare en banc review and Supreme Court discretionary review. There is an admitted trade-off between the geographical stability in the present system and the doctrinal stability promised in the model, but the conceded purpose of the model is to shift judicial emphasis from making the law of the circuit to making the national law on a particular subject.

Administrative worries are somewhat daunting, on first impression. Case assignment, however, is just as automatic in most courts of appeals in the current system. Techniques and technologies developed in the larger circuits, especially the Ninth Circuit, might help measure the feasibility of administering a unified intermediate court. Of course, regional administration, similar to the current clerks' offices, would be possible.

Ancillary decisional differences may be exacerbated in the model. For example, the Special Division on Antitrust might interpret the same ancillary

procedural issue differently from the Special Division on Civil Rights Legislation. Arguably, the harmony in the principal subjects might be worth this and, perhaps, the procedural Special Division could reconcile such differences. Any loss of collegiality upon the elimination of the current geographic circuits would be more than made up for in the assignment to a four-member General Divisions and an eight-member Special Division.

Finally, the notion that this organization would make it easier for Congress to add judges is quite apt, for the unified model can absorb an indeterminate number of circuit judges to be arranged in greater numbers of General and Special Divisions of expanding membership. This weakness may be the model's greatest strength, however. While adding judges to the court of appeals is a remedy to be resisted, the political reality of the last fifty years suggests judgeship creation is virtually inevitable. Therefore, any model ought to be designed to absorb new circuit judges.

## A PROPOSAL FOR A UNIFIED COURT OF APPEALS

The structure of the United States Courts of Appeals is one of the crucial issues facing the Federal Courts Study Committee. Indeed, our chartering statute explicitly recognizes the problem by specifying that we address intra-circuit and inter-circuit conflicts.

To begin our review, it is helpful to recount the historical background to better understand how and why the issue of inter-circuit conflict arose. The Circuit Courts of Appeals were created in 1891 as adjuncts to a trial court -- the Circuit Court. The judges of the Circuit Court of Appeals consisted of circuit judges (who performed trial duties), a circuit justice (who sat only in rare instances), and in the circuit justice's absence, a district court judge. These Circuit Courts of Appeals were composed generally of three, and at times, two judges. Their mission was conceived as error correction, rather than law giving. The circuit judges' dual trial and appellate responsibilities continued until 1911 when the Circuit Courts (the old federal trial courts) were abolished, the Circuit Courts of Appeals remaining as appellate bodies.

As the volume of appeals rose, the supervisory capacity of the United States Supreme Court diminished and the number of circuit judges grew. The Courts of Appeals became increasingly regionalized, eventually considering themselves autonomous -- answerable only to the Supreme Court. Precedents established by

the law and in increased litigation and uneven application of legal principles on a geographic basis.

There would be, concededly, a need for a mechanism to correct the situation caused by inadvertent, inconsistent panel decisions, or the comparatively few instances when the first panel decision was erroneous. This could be accomplished by the Supreme Court in a few cases, but the primary responsibility should lie with the unified Court of Appeals. It created the problem and it should cure it, rather than relegating its resolution to another, separate appellate court created for that purpose.

This error correction mechanism within the unified court could take a variety of forms. It could consist of ad hoc panels of five or seven judges, or could be a standing entity to which judges would be assigned for a period of months, or years, or permanently. If necessary, it could consist of judges who specialize in certain areas of the law, although I favor the traditional, generalized judicial approach. The corrective entity could be unitary, or it could function through three or four bodies assigned to large geographic areas. That choice, I believe, would be dictated by the volume of anticipated work. For purposes of discussion, I will refer to the mechanism eventually selected as the "Central Division."

In whatever form it takes, the Central Division should be staffed by circuit judges equal in rank to those who sit on the three-judge panels. This provision would insure that the

Central Division remain consistent with the concept of a unified court, reduce the possibility of divisiveness, and guard against a weakening of the three-judge panels. Some qualifications for service on the Central Division might be thought suitable, such as prior service of five or ten years as a circuit judge. Salary should remain the same for all circuit judges.

Designation of judges to serve in the Central Division for periods of time might be made by a neutral body, such as the Judicial Conference or the Circuit Councils. Headquarters for the Central Division or subdivisions preferably should be located outside Washington, D.C. -- perhaps in the midwest -- to emphasize the unitary but independent character of the division.

Cases would reach the Central Division in three ways: by certiorari from the original decisions of a panel; in subsequent litigation by certification from other panels which question the correctness of the original holding; or by litigants in subsequent litigation who would concede the applicability of the original panel decision, but challenge its correctness. Whether recourse to the Central Division should be a prerequisite for certiorari to the United States Supreme Court is a question worthy of further study. In no other fashion would the jurisdiction of the Supreme Court be affected.

A number of positive features would flow from unification:

1. The status of the Courts of Appeals would be enhanced, making service on the Court more attractive to those men and women who would be desirable additions to the bench.

2. The increased stature of a unified court would make it more difficult for state supreme courts to resist efforts to have some federal questions channeled first to the Court of Appeals, rather than directly to the United States Supreme Court as the present statute provides.

3. Deliberate inter-circuit clashes would be eliminated and inadvertent intra-court conflicts would be resolved internally.

4. Forum shopping and "non-acquiescence" by governmental agencies would be lessened if not eliminated.

5. A unified court would offer flexibility in its operations both at the panel and Central Division levels, thus facilitating introduction of innovative procedures.

6. Because no separate fourth tier would be necessary, the inherent problems of filling vacancies in such a forum would be sidestepped entirely. Vacancies in a unified court could be accommodated with less difficulty than in a new, separate court.

7. The collegiality and mutual assistance likely to develop among judges in a nine-person division would be an improvement over that possible in large circuits as they exist today.



8. Prolonged disputes over geographic realignments could be substantially reduced, if not eliminated altogether.

This proposal for restructuring the Court of Appeals does not deal with the organization of the current circuit councils. These administrative entities could be reorganized in geographic areas quite independent of those allocated to the various divisions, with councils including areas encompassing a number of divisions.

The proposal for a unified court is not original. It was suggested more than fifteen years ago in various forms by Professor Maurice Rosenberg, Dean Griswald, Professor Paul Carrington, Professor Erwin Surrency, and others. It is interesting to speculate where we would be today had the plan been adopted years ago.

This proposal is the most sweeping of those the subcommittee has considered, but the crises we now face and are likely to confront the courts in the next twenty-five years demand substantial restructuring of the present system. Realistically too, any fundamental restructuring will take years of congressional consideration. Such efforts should begin soon. The comfort bred of mere familiarity with the present system should not serve to delay anticipation of, and attention to, the needs of the future.

Joseph F. Weis, Jr.

## In Banc Intercircuit Conference

Summary. The In Banc Intercircuit Conference ("IBIC") would be composed of senior judges on a rotational basis. Jurisdiction would be limited to intercircuit conflicts over federal questions; appeals would be certified from the Supreme Court. With some refinements, this draft relies on the proposal by Chief Justice Keith M. Callow, Supreme Court of the State of Washington.<sup>1</sup> The design is to create a court with national decisionmaking capacity as an outgrowth of the existing courts of appeals.

Selection of judges. The IBIC shall be composed of thirteen circuit judges, selected on the basis of seniority for a regular term, one from each of the existing courts of appeals. The most senior member shall preside. (If a court of nine judges is preferred, some rotational basis could be established to equalize participation by each circuit over time.) This objective, mechanical selection procedure would obviate the political problems with appointment of new Article III judges or designation of existing judges by the President, the Chief Justice, the Supreme Court or any other procedure. Furthermore, it would eliminate the concerns that existing circuit judges would vie unseemingly for designation or that those not designated would suffer some perceived demotion in the federal judicial hierarchy. (If the Chief Judges would object to serving on the IBIC, out of a concern for increased workload, IBIC judges might be selected automatically to designate: (a) the most senior active judge who has not served and who is not eligible to serve as chief judge; (b) former chief judges who have taken senior status; (c) former chief judges who remain in active service; (d) the junior-most judge who has taken senior status and has not yet reached age 70; or (e) active judges, other than those just mentioned, in order of seniority.) Docketing and calendaring procedures might also avoid the selection of a judge from the circuit in which the conflicting decision arose or the other circuit(s) in conflict. It would seem sufficient, however, for the statute to disqualify automatically any member of a panel being reviewed from sitting on the IBIC reviewing the decision.

A term of the IBIC should be brief, perhaps only one year, to widen participation among circuit judges and to minimize the  
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1. Letter from the Honorable Keith M. Callow to the Honorables Joseph F. Weiss, Jr. and Levin H. Campbell accompanying a memorandum on the In Banc Intercircuit Conference Proposal (June 1, 1989).

workload increase. Each judge's tour of duty would be for one term. While this creates a genuine worry for consistency and harmony, the response is that for statutory issues "in most matters it is more important that the applicable rule of law be settled than that it be settled right,"<sup>2</sup> as Justice Brandeis observed.

Selection of Cases. The Constitutional requirements of a case or controversy with all doctrinal gloss would apply, of course, to the IBIC as an Article III court. Statutorily, the requirement of a final judgment also would be a necessary jurisdictional feature. The jurisdiction of the IBIC would be restricted to federal cases certified by a majority of the Supreme Court to involve a conflict between two or more courts of appeals or between a court of appeals and the highest court of a state over the interpretation of a federal rule of procedure, a federal statute, or treaty. (Note this is a departure from the current Supreme Court screening procedure which follows the so-called "Rule of Four.") Consistent with the position of the Conference of Chief Justices, the IBIC would not hear appeals from state courts.<sup>3</sup> Furthermore, issues of Constitutional law would be beyond the jurisdiction of the IBIC. The IBIC would have mandatory jurisdiction over certified cases, i.e., the Supreme Court's determination that a conflict existed would be binding on the IBIC and the IBIC would not have the power to decline to decide a case otherwise properly certified.

Chief Justice Callow estimates that the IBIC would have a docket of approximately 20 cases per year. This seems too low an estimate.<sup>4</sup> In recent Supreme Court Terms, intercourt conflicts have comprised approximately 5% of the entire docket and about one-third of the signed opinions. Justice White, in recent Terms, has dissented from the denial of certiorari to leave a record of additional unresolved conflicts. This means the Supreme Court is resolving upwards of 50 conflicts and declining review in between 20 to 40 more--each October Term. Presumably, most of the conflicts now being resolved by the Supreme Court would be certified to the IBIC, along with at least some of the cases now being denied review. Therefore, a more realistic docket estimate would be 40 to 60 cases per year. Thus the workload increment to be added to the designated circuit judges would not be insubstantial: the equivalent of two or more

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2. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

3. But see Cameron, Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals--A State Judge's Solution to a Continuing Problem, 1981 B.Y.U. L. REV. 545.

4. See Baker, Siskel and Ebert at the Supreme Court, 87 MICH. L. REV. 1472, 1484-85 (1989).

circuit sittings over the one year term.

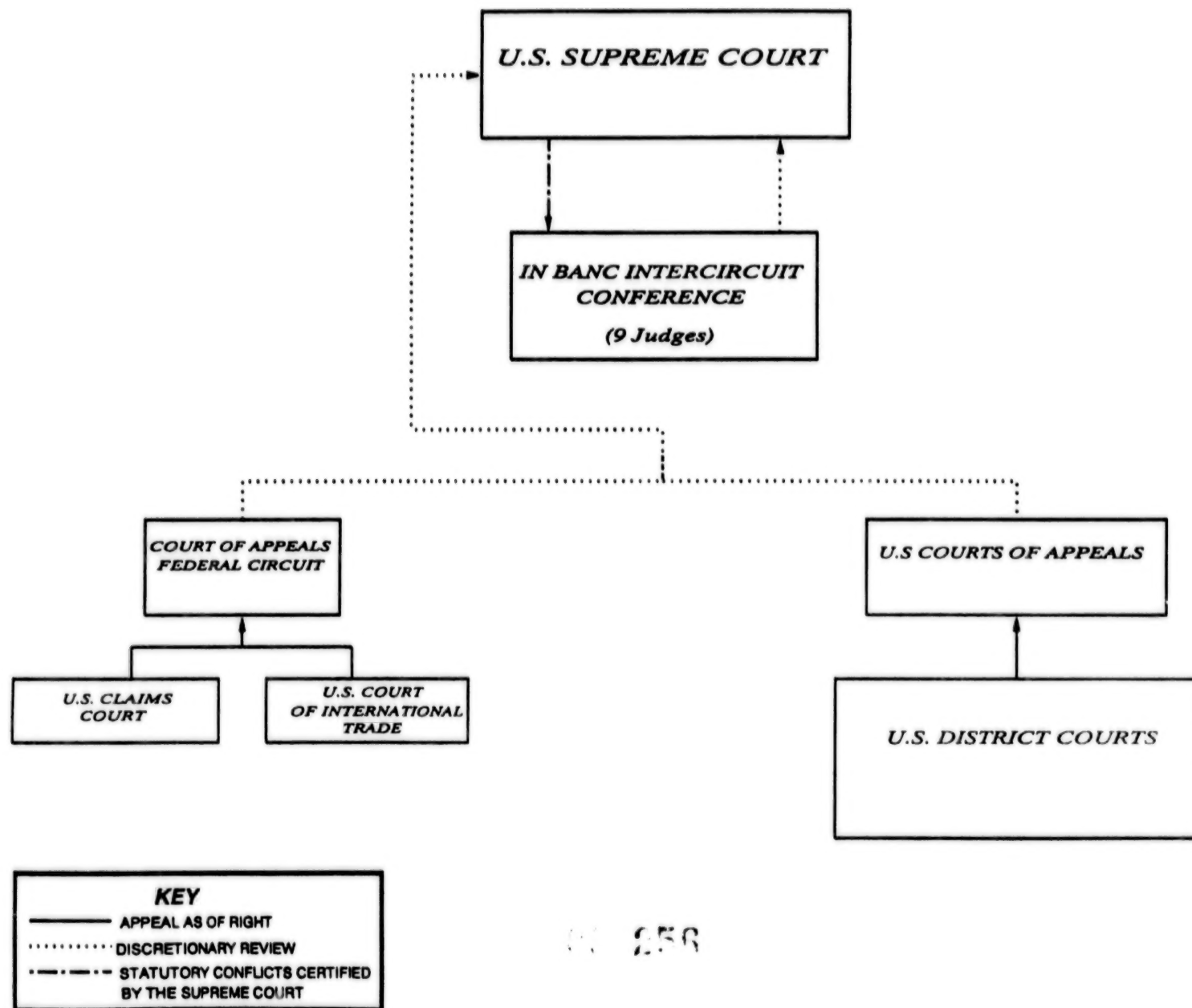
Effect on Precedent. The decisions of the IBIC would be reported in the United States Reports, following the decisions of the Supreme Court of the United States. IBIC holdings would be binding precedent on all courts, federal and state, subject only to review pursuant to a writ of certiorari in the Supreme Court. A panel of the IBIC could not overrule a decision of a previous panel, absent intervening legislation by Congress or supervening Supreme Court precedent. Current procedures in the circuits for panel rehearings and en banc rehearings would not be changed.

The IBIC proposal is designed to enhance the authority and prestige of the courts of appeals by the creation of a mechanism within the existing intermediate tier for resolving conflicts at that level. This proposal is based on the assumptions that the current capacity for achieving a satisfactory uniformity in the national law is not adequate and that neither the Supreme Court nor any other institutional reform of the courts of appeals can sufficiently improve the situation.

**In Banc Intercircuit Conference  
(Suggested by Chief Justice Callow)**

- . Establish an In Banc Intercircuit Conference between the United States Courts of Appeal and the United States Supreme Court.
- . Jurisdiction would be limited to intercircuit conflicts over federal questions.
- . Cases would be certified from the Supreme Court to the IBIC.
- . The IBIC would be composed of circuit judges serving for brief, perhaps only 1 year, terms.
- . The IBIC holdings would be binding precedent on all courts, federal and state, subject only to certiorari review by the Supreme Court.

***IN BANC INTERCIRCUIT CONFERENCE***  
***(SUGGESTED BY CHIEF JUSTICE CALLOW)***





## Regional Inter-Circuit Tribunals

**Summary** The regional intercircuit tribunals (ICT) would consist of four panels of five circuit judges who would sit en banc to render decisions in cases where two circuits are in conflict. Each circuit would be assigned to a regional ICT, whose judges would be selected at random from within the member-circuits. Judges would sit on the ICT for a term of one year, ensuring constant rotation of judges.

**Selection of Judges** Each ICT would be composed of five judges who are currently active judges of the United States Courts of Appeals. Judges would be selected at random from within the circuits and assigned to the ICT for a term of one year. Regions would be created by roughly grouping the circuits by numbers of judges. They would be grouped as follows:

ICT # 1	1st, 2nd, 3rd, D.C.	(43 judges)
ICT # 2	4th, 5th, 11th	(39 judges)
ICT # 3	6th, 7th, 8th	(36 judges)
ICT # 4	9th, 10th	(38 judges)

While a judge is sitting on an ICT, his or her caseload would be reduced as is appropriate.

By using random selection, the political problems which accompany judge selection would be eliminated. It would also allow for all active circuit judges to have the opportunity to sit on an ICT. Upon the completion of a term, a judge would be ineligible to sit again for a period of four years. This would ensure maximum turn-over of judges.

**Selection of Cases** The ICT would serve one primary purpose: to resolve statutory conflicts among circuits. By eliminating conflicts, coherency in federal law would be encouraged. In addition, it is anticipated that the workload of the Supreme Court will be reduced. Currently, the Supreme Court is the only court which can resolve inter-circuit conflicts. The presence of the ICT's would allow the Supreme Court to become more selective in the conflict cases it does decide.

Selection of cases for the ICT's could be relatively simple. When a circuit renders a decision which is in conflict with another circuit, the case would be referred to the regional ICT where the conflict was created (i.e. the 1st circuit renders a decision which is in conflict with the 4th circuit. The case is referred to the ICT for the 1st, 2nd, 3rd, and D.C. circuits) which renders a decision resolving the conflict.

In regards to the Federal Circuit, when a decision of that court is in conflict with another circuit, the residence of the plaintiff will determine which ICT will be used.

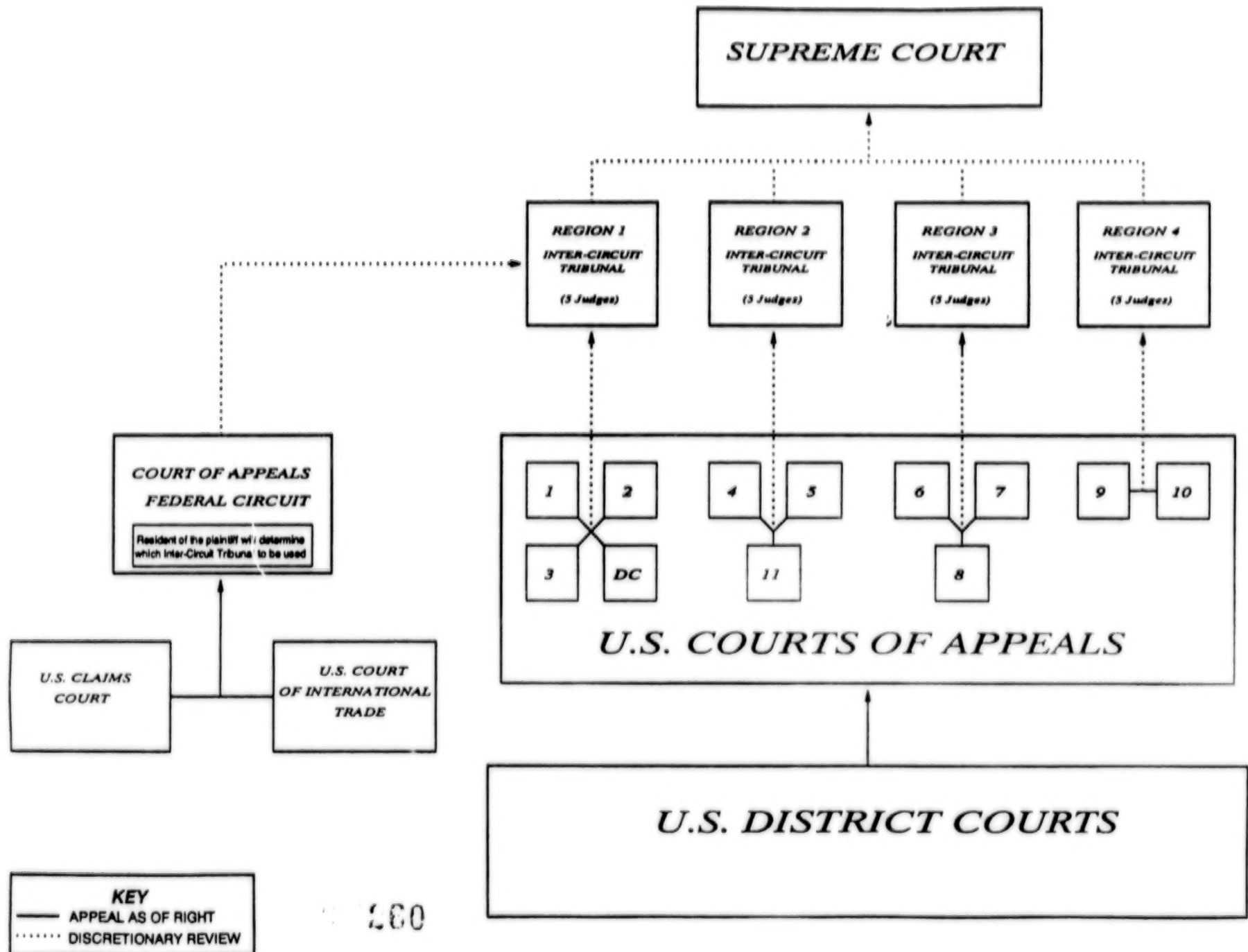
Effect on Precedent Decisions of the ICT would be binding only within its own member circuits, though they would have persuasive effect in others. Decisions of the ICT's would be reported in the Federal Reporter. The decisions of the ICT would be reviewable to the Supreme Court on a writ of certiorari. It is expected that the Supreme Court would only grant writs of certiorari in the most important cases, those which involve either a constitutional matter of a substantial federal statutory question, although it always has the option to select any case for an authoritative decision.

## Regional Inter-Circuit Tribunals

- . Establish four regional Inter-Circuit Tribunals consisting of five circuit judges each.
- . Each regional Inter-Circuit Tribunal would sit in banc to render discissions in cases where two circuits were in conflict.
- . Each of the present circuit courts would be assigned to a regional ICT.
- . Judges would be assigned to regional ICT's from the circuits in that region and would serve for one year terms.
- . Judges assigned to ICT's would come from the present roster of circuit judges.

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# REGIONAL INTER-CIRCUIT TRIBUNALS



## Specialized Courts

**Summary** The Court of Tax Appeals and the Court of Administrative Appeals would be permanent article III appellate courts of limited jurisdiction. The Court of Tax Appeals would hear appeals in tax cases from the U.S. Tax Court, the U.S. Claims Court, and the U.S. District Courts. The Court of Administrative Appeals would hear appeals from the District Courts and the administrative agencies. Decisions of both courts would be reviewable by the Supreme Court.

**Selection of Judges** The Court of Tax Appeals and the Court of Administrative Appeals would be permanent article III courts. Judges would be appointed by the President subject to confirmation by the United States Senate. Based on projected caseloads, the Court of Tax Appeals would have 5 judges and the Court of Administrative Appeals would have 7 to 9 judges. Each court would sit in three judge panels, though by majority vote of the court, it could elect to sit en banc in panels greater than three and less than the full court.

**Selection of Cases** All cases of the U.S. Tax Court, tax cases from the U.S. Claims Court, and tax cases in the U.S. District Court would be appealable (by right) to the Court of Tax Appeals. Defining a "tax" case presents some drafting difficulties. Bankruptcy cases, for example, often contain a tax issue. Cases from administrative agencies and the U.S. District Courts regarding administrative agencies (i.e. social security) would be appealable (by right) to the Court of Administrative Appeals. The decisions of both courts would be reviewable by the Supreme Court through the grant of a writ of certiorari.

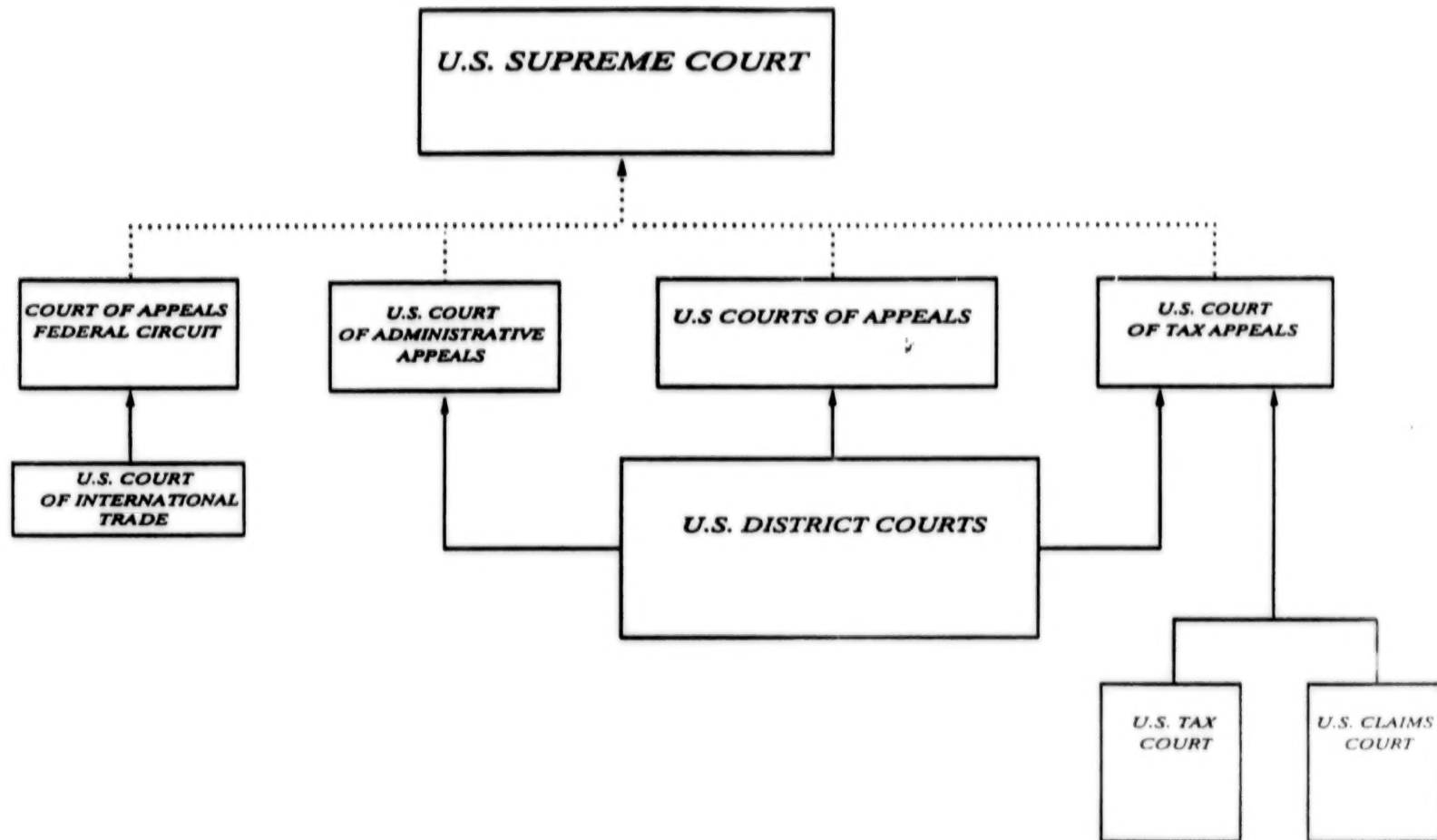
**Effect of Precedent** Decisions of the Court of Tax Appeals and the Court of Administrative Appeals would be binding throughout the federal courts and would bind the administrative agency, thus ending the "acquiescence" policies now in force. They would be subject to further review by the Supreme Court. Decisions of both courts would be reported in the Federal Reporter. One result would be a significant reduction in the caseload of the D.C. circuit.



## **Subject Matter Courts**

- . Establish the Court of Tax Appeals and the Court of Administrative Appeals as new permanent Article III courts of limited jurisdiction with new appointment of judges.
- . The Court of Tax Appeals would have approximately five judges.
- . The Court of Administrative Appeals would have approximately seven to nine judges.
- . Each court would sit in three judge panels.
- . The Court of Tax Appeals would hear appeals in tax cases from the United States Tax Court, the United States Claims Court and the United States District Court.
- . The Court of Administrative Appeals would hear appeals from District Courts and administrative agencies.

## *SUBJECT MATTER COURTS*



### **KEY**

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..... DISCRETIONARY REVIEW

**Bi-Level Appellate Court Structure**  
**(Suggested by Chief Judge Campbell)**

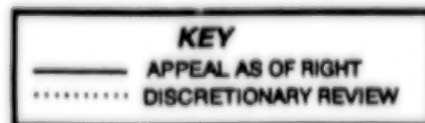
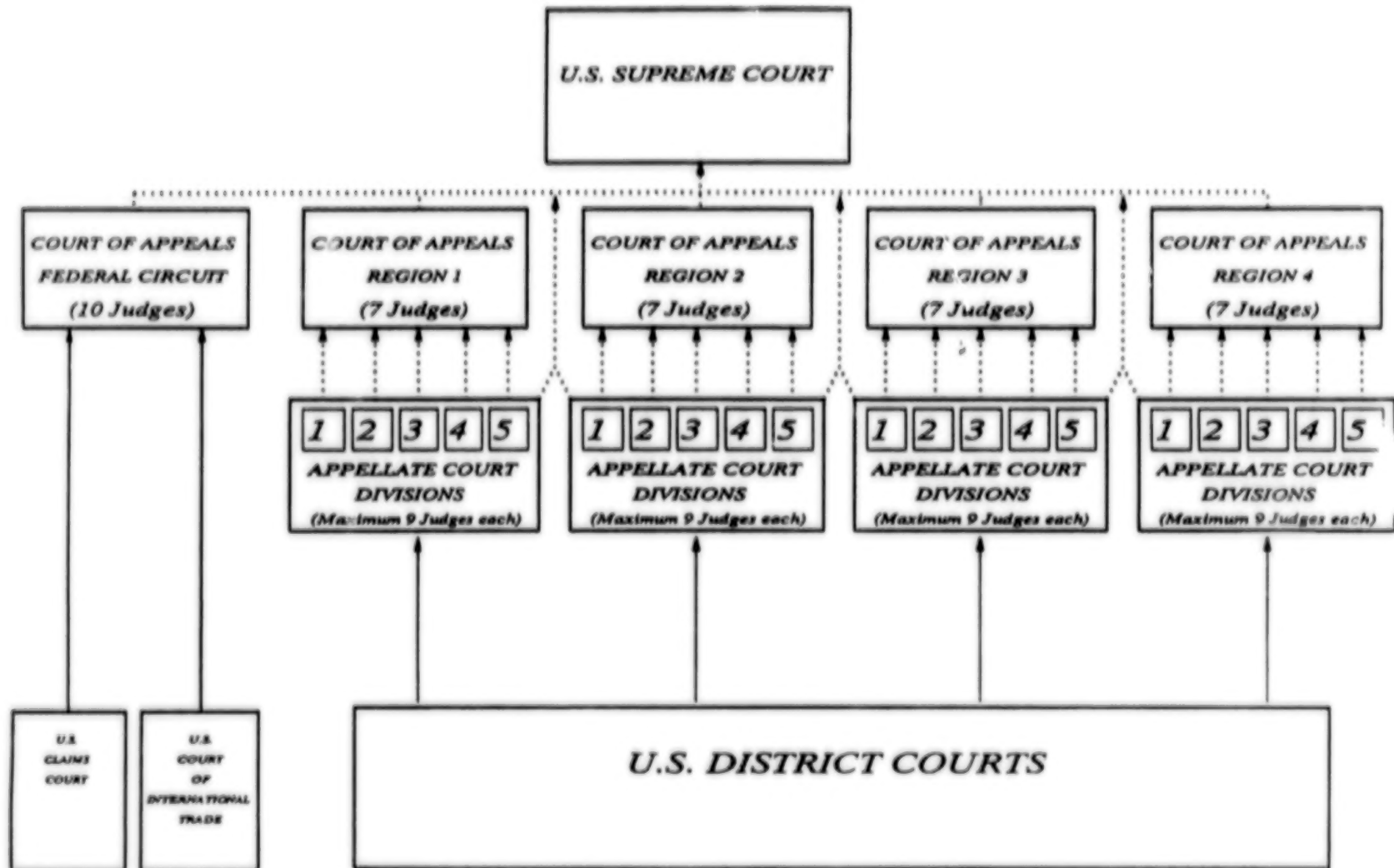
- . Establish a Bi-Level Appellate Court Structure.
- . Divide the present circuit Court of appeals into twenty appellate court divisions with a maximum of nine judges in each division, sitting in panels of three.
- . Establish between the appellate court divisions and the Supreme Court, four regional courts of appeals with seven judges assigned to each region. The regional courts of appeals would sit in banc.
- . Appeals from the district courts would go to the appellate court division in the same manner as appeals now go from the district courts to the regional courts of appeals.
- . The regional courts of appeals would have jurisdiction through a certiorari process over decisions of panels of the appellate courts division.
- . The regional courts of appeals would exist both to review conflicts between divisions and to hear cases involving substantial issues of federal law.

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# BI-LEVEL APPELLATE COURT STRUCTURE

(SUGGESTED BY CHIEF JUDGE CAMPBELL)





## Unified Court of Appeals

**Summary** The unified United States Court of Appeals would encompass a major restructuring of the current Court of Appeals. The 12 circuits would be abolished and replaced with divisions of nine judges. A Central Division would be created to be a mechanism for resolving inconsistencies among divisions. All current circuit judges would be assigned to a division and new judges would be subject to current article III selection procedures.

**Selection of Judges.** As an article III court, the unified United States Court of Appeals (USCA) new judges would be appointed in the same method as all other article III judges: appointed by the President after confirmation by the United States Senate. However, in that this court is a restructuring of the current Court of Appeals, all current active circuit judges will be selected by the Judicial Conference to a division.

**Structure of the Court.** The current twelve geographic circuits will be abolished and replaced with several divisions, each with no more than nine judges. With the current number of statutorily authorized circuit judges (excluding the federal circuit - 156) there would be approximately 17 to 18 divisions across the nation. Each division would have its own clerks office and administrative facilities. Cases would be heard by three-judge panels from within the divisions. Of course, senior judges or visiting judges could also sit on these panels.

The Congress could authorize the Judicial Conference to monitor and realign the geographical boundaries of divisions, as the number of appeals fluctuated so that the judicial membership could remain at nine.

The unified USCA would also include a "central division" which would serve as a mechanism to correct the situation caused by the inadvertent, inconsistent panel decisions, or when the panel decision was erroneous. The central divisions main function would be to correct what today are called "intra-circuit" conflicts. (By definition there could not be inter-circuit conflicts).

There are several options for membership of the central division. It could consist of ad hoc panels of five to seven judges, or it could be a standing entity to which judges would be assigned to for a period of months, years, or permanently. There could be one central division or there could be three to four central divisions assigned to large geographical areas.

Judges assigned to the central divisions, in whatever form, would be circuit judges equal in rank to those who sit on the three-judge panels. There could be a service requirement to sit on a central division (such as 5 years on the bench). Salary would be equal for all circuit judges.

Selection of Cases and Effect on Precedent The general divisions would hear appeals from the district courts under their jurisdiction. The decisions of three-judge panels would be nationwide precedent unless over-ruled by the central division or the Supreme Court.

Cases would reach the Central Division in three ways: by certiorari from the original decisions of a panel; in subsequent litigation by certification from other panels which question the correctness of the original holding; or by litigants in subsequent litigation who would concede the applicability of the original panel decision, but challenge its correctness.

Decisions of the Central Division would establish national precedent unless reversed by the Supreme Court.

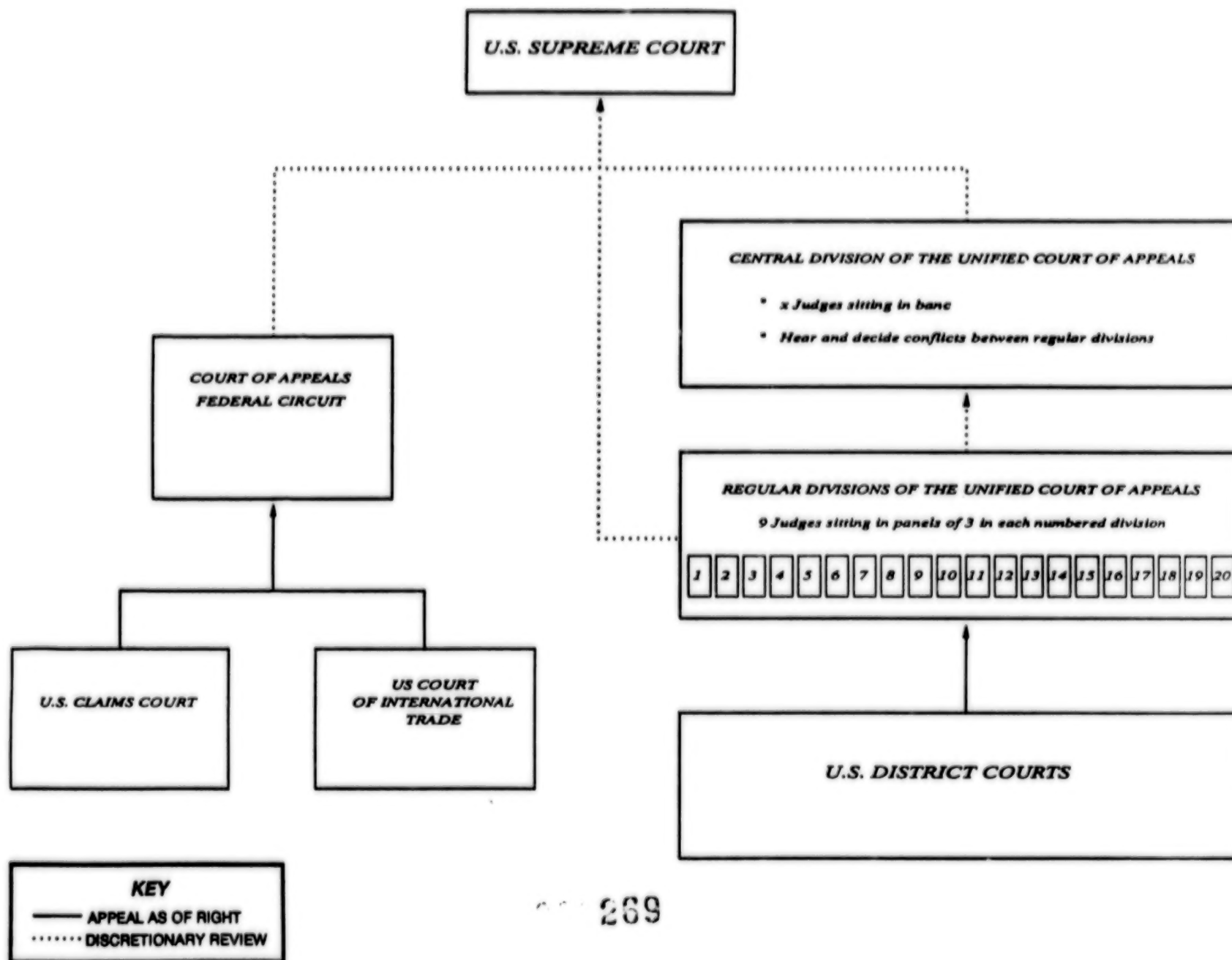
**Unified Court of Appeals  
(Suggested by Judge Weis)**

- . Establish one Unified Court of Appeals with two layers.
  
- . All regional circuits would be abolished and would be replaced by approximately twenty regular divisions of no more than nine judges each, sitting in panels of three.
  
- . A panel decision in any division would be binding nationally.
  
- . Above the regular divisions, there would be one central division to deal with inconsistent panel decisions.
  
- . "Appeals" to central division would be either by the filing of a writ of certiorari by a party asserting a conflict or by certification from a panel of the regular division noting a potential conflict or by certiorari in subsequent litigation by a party conceding the applicability of a prior decision, but challenging its correctness.
  
- . Appointment to the Unified Court of Appeals would be general, judges could rotate from the regular division to the Central division and vice-versa.

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# UNIFIED COURT OF APPEALS

(SUGGESTED BY JUDGE WEIS)



## The MEADOR Plan for the Court of Appeals

**Summary** The restructuring of the Court of Appeals proposed by Professor Daniel J. Meador would result in a major overhaul of the federal appellate system. The regional circuits would be abolished and replaced with divisions consisting of nine judges each. In addition, there would be five lettered divisions (A through E) with regional jurisdiction to resolve conflicts among the numbered divisions. The lettered divisions would hear cases on a discretionary basis (through a certiorari process). Lastly, the court would also include four specialized divisions of limited jurisdiction (Commercial, revenue, administrative, and state). All divisions of the court would be staffed by article III circuit judges of equal rank and pay.

**Structure of the Court** The current twelve geographic circuits will be abolished and replaced with several divisions, each with nine judges. With the current number of statutorily authorized circuit judges (excluding the Federal Circuit - 156) there would be approximately 17 to 18 divisions across the nation. Each division would have its own clerks office and administrative facilities. Cases would be heard by three judge panels from within the division. Of course, senior judges or visiting judges could also sit on these panels.

The Congress could authorize the Judicial Conference to monitor and realign the geographical boundaries of divisions, as the number of appeals fluctuated so that the judicial membership could remain at nine.

In addition to the 18 numbered divisions there would be five divisions (A through E) which would resolve conflicts among the divisions (corresponding to the idea of Inter-Circuit Tribunals) on a discretionary basis. Each lettered division would have seven judges who would sit en banc (or in a group of five). The primary difference between the lettered divisions and the Inter Circuit Tribunals is that the lettered divisions would be permanent entities with stable membership.

Lastly, there would be four specialized divisions created. These would function like the Federal Circuit (which would remain as a specialized division). An initial design of the court would include an Administrative Division, Commercial Division, Revenue Division, and a State Division. With the exception of the Revenue division, which would have seven judges, the other divisions would have nine judges.

**Selection of Judges** As an article III court, new judges for the Court of Appeals would be selected in the same method as all other article III judges: appointed by the President after confirmation by the U.S. Senate. However, in that this court is a restructuring



of the current Court of Appeals, all current active circuit judges will be appointed to a division by the Judicial Conference of the United States.

**Selection of Cases and Effect on Precedent** The numbered divisions would hear appeals from the district courts under their jurisdiction (except those cases whose jurisdiction falls under the specialized divisions). The decisions of the three-judge panels would establish nation-wide precedent unless over ruled by a lettered division or the Supreme Court.

The lettered divisions would hear cases when two numbered divisions are in conflict. The lettered divisions would use their discretion as to what cases they would hear by granting a writ of certiorari. Cases they resolved would be reviewable to the Supreme Court. A decision of a numbered division denied review by a lettered decision would be final and not subject to review by the Supreme Court.

The Administrative Division would have jurisdiction to hear appeals from administrative agencies (such as NLRB, FTC, FCC, INS, and etc...) as well as decisions of the district courts involving administrative agencies (such as social security appeals). Decisions of the administrative division would be reviewable by the Supreme Court.

The Commercial Division would have jurisdiction to review all district court judgements in patent infringement cases and in actions under the anti-trust laws. It would also hear appeals from the Court of International Trade. The decisions of the commercial division would be reviewable by the Supreme Court.

The Revenue Division would hear appeals from the U.S. Tax Court, tax cases from the U.S. Claims Court, and tax cases from the District Courts. The decisions of the revenue division would be reviewable by the Supreme Court.

The State Division would have jurisdiction to review final decisions of the highest state courts involving a question of federal law. In other words, this division would be assigned all of the jurisdiction currently vested in the Supreme Court to review state decisions (including the Supreme Court of Puerto Rico and the District of Columbia Court of Appeals). This jurisdiction would be entirely on a certiorari basis. Decisions of the division would be reviewable to the Supreme Court.

**Unified Court of Appeals**  
**(Suggested by Professor Meador)**

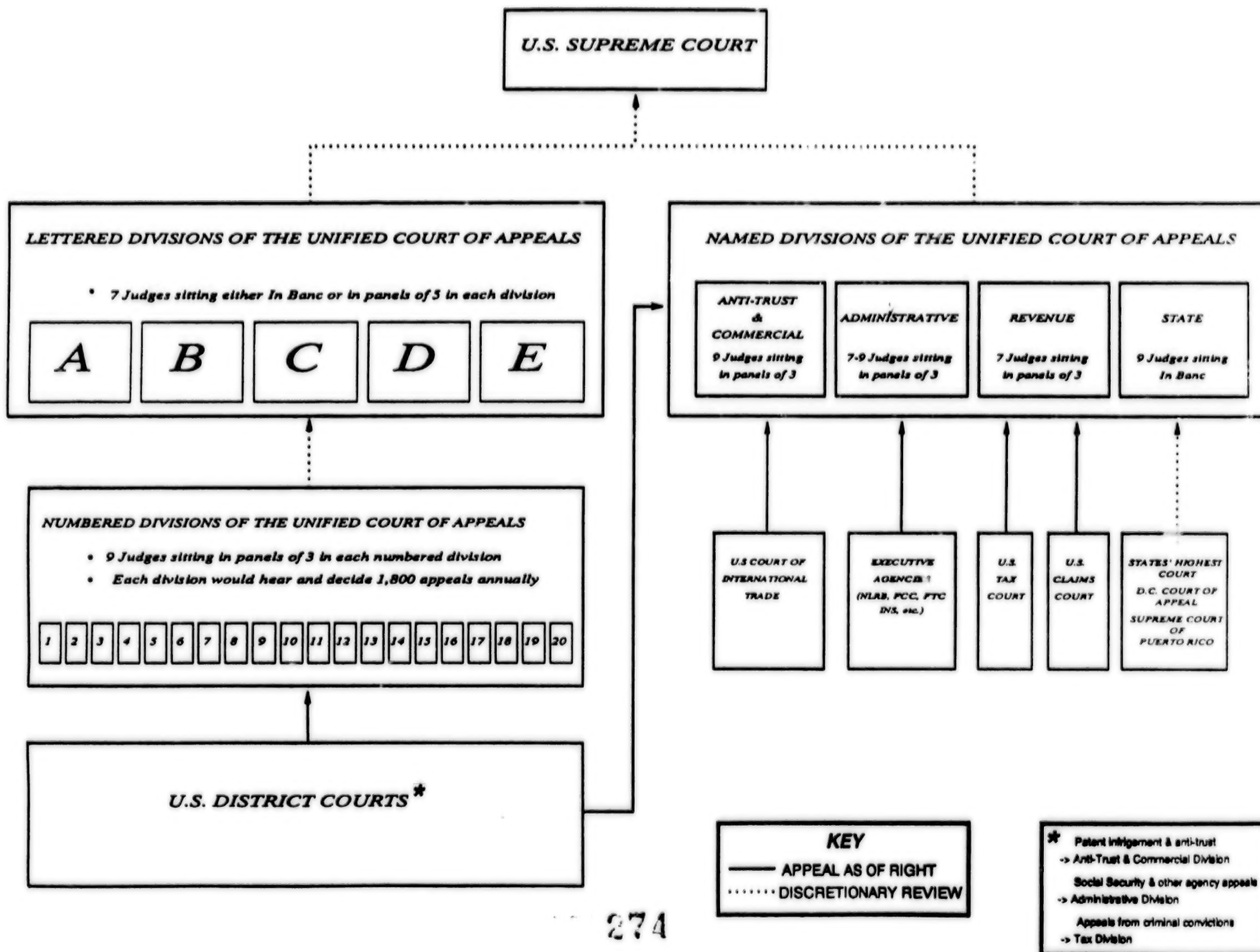
- . Establish one Unified Court of Appeals
- . Establish twenty divisions of the Unified Court of Appeals with nine judges in each division to replace all regional courts of appeals.
- . Establish five lettered divisions of the Unified Court of Appeals with regional jurisdiction to resolve conflicts among the numbered divisions.
- . Establish four specialized divisions of the Unified Court of Appeals, each with limited jurisdiction. The specialized divisions would be 1) anti-trust and commercial, 2) revenue, 3) administrative and 4) state.
- . With exception of the revenue division, each division would have nine judges. The revenue division would have seven.
- . With the exception of the state division, each division would sit in panels of three. The state division would sit in banc.
- . The administrative division would have jurisdiction to hear appeals from administrative agencies as well as decisions of the district courts involving administrative agencies.
- . The commercial division would have jurisdiction to review all district court judgements in patent infringement cases and in actions under the anti-trust laws. It would also hear appeals from the U.S. Court of International Trade.
- . The revenue division would hear appeals from the U.S. Tax Court, tax cases from the U.S. Claims Court and tax cases from the district courts.

Unified Court of Appeals  
(Suggested by Professor Meador)

- . The state division should have jurisdiction to review by certiorari decisions of the highest state courts involving questions of federal law.
- . There would be 9 judges in each lettered division, which could sit either in banc or in panels of five.
- . Decisions of the lettered divisions would be subject to review by certiorari in the United States Supreme Court on the same basis, and for the same reasons, that courts of appeals' decisions are presently reviewable in the Supreme Court.
- . A decision of a numbered division denied review in the lettered division would be final and not subject to review by the Supreme Court.

# UNIFIED COURT OF APPEALS

(SUGGESTED BY PROFESSOR MEADOR)



**Unified Court of Appeals**  
**(Suggested by Professor Carrington)**

- . Establish one Unified Court of Appeals, consisting of two layers.
- . The First layer would be composed of forty regional divisions of four judges each.
- . The regional divisions would sit in panels of three and appeals would be made substantially orally with respect to argument and decision. The decisions would be rendered at the time of hearing without a conference and without written opinion.
- . The second layer would be comprised of special divisions of limited jurisdiction, with the number of divisions determined by the number of fields of law in which a substantial number of opinions are likely to be written.
- . Judges would be assigned to the special divisions from the regional division in a manner analogous to the committee assignments of Senators.
- . Each special division would be comprised of eight judges sitting in panels of seven.
- . Appeals to the special divisions would be briefed and decided with written opinions.
- . Cases would reach the special division when a regional division panel decided that the case is suitable for decision by a written opinion of the court of appeals.

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# UNIFIED COURT OF APPEALS

(SUGGESTED BY PROFESSOR CARRINGTON)

U.S. SUPREME COURT

## SPECIAL DIVISIONS OF THE UNIFIED COURT OF APPEALS \*

- \* 8 Judges Sitting in Panels of 7 in each special division
- \* Cases fully briefed and decided with full written opinions

ANTI-TRUST	TAXATION	INTELLECTUAL PROPERTY	BANKRUPTCY	GOVERNMENT CONTRACTS	LABOR LAW	SECURITIES REGULATION	FEDERAL CRIMINAL LAW	FEDERAL CIVIL PRACTICE	CIVIL RIGHTS	TORT CLAIMS AGAINST U.S.
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## 40 REGULAR DIVISIONS OF THE UNIFIED COURT OF APPEALS

- \* 4 Judges sit in panels of 3 in each division
- \* Cases presented and decided orally

U.S. DISTRICT COURTS

### KEY

- APPEAL AS OF RIGHT  
 ..... DISCRETIONARY REVIEW

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- \* Unified Court of Appeals would be comprised of two divisions. Appeals to the Regular Divisions would be referred to the Special Divisions if the appeal raised a substantial issue of federal law.

## National Court of Appeals

**Summary.** The National Court of Appeals ("NCA") would consist of seven new Article III judges who would sit en banc to render nationally binding decisions. Then NCA would have reference and transfer jurisdiction. This model is based on the Hruska Commission's proposal with a few alternatives suggested in some bills subsequently introduced but not enacted, particularly Chief Justice Burger's ill-fated Intercircuit Panel.<sup>1</sup>

**Selection of Judges.** The NCA would be composed of seven new judges with Article III status, i.e., nominated by the President and confirmed by the Senate for a term of good behavior. A seven chaired bench is large enough to afford collegial decisionmaking without being so large as to imitate the diseconomies of scale of the oversized en banc court. Selection is the most problematic feature. Authorizing one President to appoint an entire national court for life is the original design of Article III, but contemporary politics little resemble those of George Washington's day. Compromise bills quickly evolved to propose phases of appointment: the President would appoint the chief judge and an associate judge upon establishment of the NCA, two more associate judges would be appointed four years later, and the last two associate judges would be appointed after an additional four years. In the interim, circuit judges would be designated to fill the temporary positions. It seems apparent that neither the Article III paradigm nor the compromise is politically viable and, hence, the proposal has been relegated to a legislative limbo.

The Intercircuit Panel proposal, endorsed by Chief Justice Burger in 1983, would have avoided the appointment catchpoint by creating a temporary panel composed of a circuit judge from each court of appeals designated by one of various suggested mechanisms, including one version that called for designation by the Supreme Court. Designated judges would serve a term as brief as six months. The panel would have been a temporary experiment that might be abandoned after five years or sooner, if it proved ineffective. This proposal was the subject of hearings and

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1. U.S. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendation for Change, 67 F.R.D. 195, 237-47 (1975). See also generally Gazell, The National Court of Appeals Controversy: An Emerging Negative Consensus, 1986 N. ILL. L. REV. 1, 15-26; Note, Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court, 97 HARV. L. REV. 307, 313-18 (1983).

managed to make it out of Senate committee before succumbing to legislative ennui.

**Selection of Cases.** The case or controversy requirements with all doctrinal gloss would apply, of course, to the NCA as an Article III court. The statutory final judgment requirement also would be a necessary jurisdictional feature. The caseload for the NCA would be generated by Reference Jurisdiction and Transfer Jurisdiction.

Most of the NCA docket would consist of cases on Reference Jurisdiction, more accurately considered as a reform of Supreme Court jurisdiction. Petitions for review would continue to be lodged with the Supreme Court which would continue to have the discretion to grant review and decide the case on the merits or to deny review and end the litigation. The proposal would add two more options for the Supreme Court, first, to deny review but to refer the case to the NCA for a mandatory decision on the merits and, second, to deny review but refer the case to the NCA to allow the new court the option to grant review or deny review. Admittedly, the elimination in 1988 of the Supreme Court's mandatory jurisdiction lessens the need for this power to transfer. Notably, screening the Supreme Court's docket and control of the high court's discretionary docket are preserved for the Justices under the NCA proposal, unlike the earlier much-controverted Freund Proposal, which would have empowered the new court to screen the certiorari petitions for the Supreme Court.

The remainder of the NCA docket, Transfer Jurisdiction, more accurately may be considered as an adjustment to the jurisdiction of the various courts of appeals. An appeal in one of the courts of appeals might be transferred to the NCA if (1) the controlling issue of federal law is the subject of conflicting holdings between circuits; (2) the appeal turns on a question of federal law applicable to a recurring factual situation and it is concluded that the advantages of a prompt and definitive determination by the NCA outweigh any potential disadvantages of transfer (an example would be the recent litigation over the Sentencing Guidelines);<sup>2</sup> or (3) the appeal is controlled by a previous ruling by the NCA and there is substantial question about the proper interpretation or application of that rule of federal law. These Transfer Jurisdictions are analogous to two existing procedures: the rarely used 28 U.S.C. § 1292(b), which allows a district court to certify a controlling question of law to a court of appeals, and the procedure for certification of issues of state law from federal courts to state courts, available in some states. In later legislative proposals, Transfer Jurisdiction was left out in response to strong and diverse opposition.

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2. Mistretta v. United States, 109 S.Ct. 647 (1989)

The later-evolved Intercircuit Panel version, endorsed by Chief Justice Burger, would have established a simpler jurisdiction to decide cases presenting intercircuit conflicts which the Supreme Court would refer. At the Supreme Court's option, the reference over to the panel for decision on the merits would be made mandatory or discretionary with the panel. Subsequent review by certiorari in the Supreme Court would be possible in theory but rare in practice.

Effect on Precedent. A decision of the NCA would be a binding precedent on all courts, subject to review only pursuant to a writ of certiorari in the Supreme Court. The NCA would have power to overrule its own precedents. The Intercircuit Panel would function similarly.

The Hruska Commission summarized the arguments for creating the NCA:

The proposed National Court of Appeals would be able to decide at least 150 cases on the merits each year, thus doubling the national appellate capacity. Its work would be important and varied, and the opportunity to serve on it could be expected to attract individuals of the highest quality. The virtues of the existing system would not be compromised. The appellate process would not be unduly prolonged. There would not be, save in the rarest instance, four tiers of courts. There would be no occasion for litigation over jurisdiction. There would be no interference with the powers of the Supreme Court, although the Justices of that Court would be given an added discretion which can be expected to lighten their burdens.

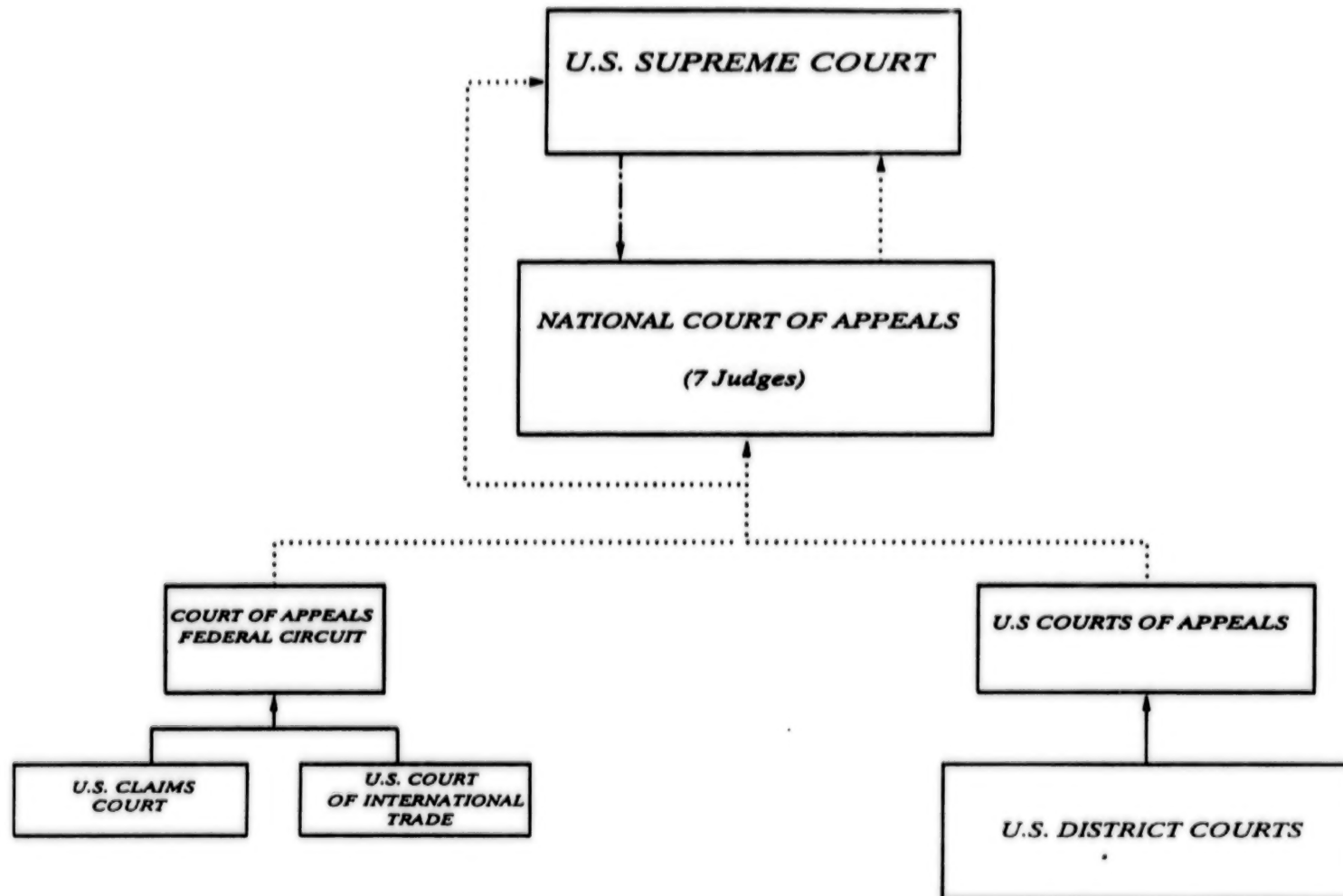
The new court would be empowered to resolve conflicts among the circuits, but its functions would not be limited to conflict resolution alone: It could provide authoritative determinations of recurring issues before a conflict had ever arisen. The cost of litigation, measured in time or money, would be reduced overall as national issues were given expedited resolution and the incidence of purposeless relitigation was lessened. The effect of the new court should be to bring greater clarity and stability to the national law, with less delay than is often possible today.<sup>3</sup>

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3. Report, supra note 1, at 246-47.

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# *NATIONAL COURT OF APPEALS*

*(SUGGESTED BY THE HRUSKA COMMISSION REPORT)*



**KEY**

————— APPEAL AS OF RIGHT

..... DISCRETIONARY REVIEW

- - - - - CERTIFIED BY THE SUPREME COURT

**NOTE:**

The original report of the Hruska Commission contained a recommendation that the National Court of Appeals have jurisdiction over cases referred to it by the Supreme Court as well as cases transferred to it from any of the courts of appeals. The proposal for transfer jurisdiction was withdrawn in later consideration of the commission's report.



**National Court of Appeals**  
**(Suggested by the Hruska Commission's Report)**

- . Establish a National Court of Appeals as a new Article III Court with new appointment of judges.
- . The NCA would have seven new judges nominated by the President and confirmed by the Senate.
- . The NCA would have jurisdiction over cases referred to it by the Supreme Court for either mandatory review by the NCA or discretionary review by the NCA.
- . The NCA would also have jurisdiction to review cases transferred from one of the court of appeals to the NCA.
- . The original report of the Hruska Commission contained a recommendation that the National Court of Appeals have jurisdiction over cases referred to it by the Supreme Court as well as cases transferred to it from any of the courts of appeals. The proposal for transfer jurisdiction was withdrawn in later consideration of the commission's report.

PAUL D. CARRINGTON  
DUKE UNIVERSITY SCHOOL OF LAW  
DURHAM NC 27706  
919-684-5593

May 21, 1989

Hon. Joseph F. Weis, Jr.  
United States Court of Appeals  
Pittsburgh PA

Dear Joe:

At Santa Fe, you asked for my thoughts about a unified court of appeals. It is certainly an idea that would have won the enthusiastic applause of Roscoe Pound. And my own, as well.

Obviously, there are many choices to be made, and these should be greatly influenced by the tastes and ambitions of the judges who have to make any system work. For that reason, I am diffident in expressing my own thoughts, for my preferences (and often that is all they are) should count for little or nothing.

Yet I have been thinking about such matters for twenty five years, and so I cannot restrain acceptance of your invitation to make suggestions.

The benefit of unification would be to relieve the circuit judges of their preoccupation with making the law of the circuit. For reasons that I have elsewhere stated perhaps too fully, that concern results in a serious misdirection of effort at the appellate level.

A second purpose of such a revision should be to stabilize the use of personnel in the appellate court in order to improve the predictive abilities of lawyers and trial judges.

A unified court of appeals serving these purposes would necessarily be a complex institution. The following are not necessary features, but strike me as attractive to achieve the stated purposes.

First, the active circuit judges would be divided into perhaps 40 regular divisions or teams composed normally of 4 active judges each. These judges would sit, of course, in hearing panels of three. These assignments would be made by an administrative panel chosen by seniority, and for a

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substantial term of years. There might be some rotation among divisions or teams that had been too stable (e.g., no change in membership for the 24-36 months preceding an annual date of rotation). The four judges would normally be from four different but proximate states.

Secondly, each division would have responsibility for appeals from an appropriate number of district judges who would be known to the litigating public. These district judges would normally sit in one of the four states represented on the appeals division, but different appeals divisions might regularly review district judges in the same district. Thus, a trial judge or litigant would have a very good idea (albeit never a certainty) of the identity of the appellate panel from the moment of assignment of the trial judge. There would be an obvious cost of greater perceived differences among district judges in the same district, a cost that can be mitigated but not avoided if we are to regain the benefits of a "known" appellate bench.

Third, the normal appeal would be made substantially oral with respect to argument and opinion. This would be done, to the extent necessary or desired, by means of closed circuit television. It would be the clearly stated role of the appellate hearing to assure disclosure of the reactions of each hearing judge. Every party would know that she had been heard by the "known" bench. The decision would normally be rendered at the time of the hearing, without conference of the judges and without opinion, in the traditional English manner. This would be so for almost all criminal and diversity appeals. There would, of course, be no opinion of the court that would be expected to offer particular guidance in future cases. That institution, invented by John Marshall in 1801, has its important uses, but this reform would recognize that its utility is not universal.

Fourth, in not to exceed a minor fraction of the civil appeals, the hearing panel could decide that the case is suitable for decision by opinion of the court of appeals. Such a determination could be made before or at the oral presentation at which most appeals would be terminated. In such cases, the hearing panel would be augmented to seven, in a manner to be described below. A case appropriate for such treatment would be one raising a substantial issue of federal law, these being chiefly issues of statutory construction. Only these cases would result in signed and published opinions of the court, produced in the Marshall manner, after conference of the judges and extended revision of drafts. Subject to the qualification stated below, these

decisions would be the law of the land, normally insulated from Supreme Court review by their statutory nature.

Fifth, the augmentation of the hearing panel in opinion-of-the-court cases would be from the membership of special divisions of the court. Assignments to special divisions would normally be supplementary to the regular assignments of the circuit judges described above. Most active judges would thus have both a regular division and a special division duty. These special assignments would be made by some combination of seniority, choice, geographic distribution and lot. The assignments would be for an extended term of years, perhaps 8 years. Or perhaps there might be eight judges assigned to each special division, with at least one rotation off each year or so, but with no rotation when a vacancy occurs. After an initial period, no judge would be eligible for a new special assignment who was not at least six or seven years away from senior status, unless perhaps the judge chose to waive that entitlement. In any case, a method would be chosen to assure substantial stability in each division of 8 judges. In their work, these special divisions would make heavy use of modern technology, especially closed circuit television for hearings.

The number of divisions would be as large as necessary to assure a division for each field in which a substantial number of opinions are likely to be written, e.g., antitrust and related economic regulation, taxation, intellectual property, bankruptcy, government contracts, labor law, securities regulation, tort claims against the US, federal criminal laws, federal civil practice, federal criminal procedure, civil rights legislation, etc. Divisions could be created or abolished by rule of court. These special assignments of federal judges would be analogous to the committee assignments of Senators, and would create islands of special talents in a sea of general competence. It would be the assignment of each special division to maintain a coherent body of interpretation of the federal law that is its domain. To that end, the whole division would receive slip opinions in its cases and would retain a power of review modelled on the present en banc procedure in the circuits.

So constituted, a unified court of appeals could provide appellate practice that is "speedy, inexpensive and just," and could also maintain a coherent body of national law while substantially reducing the dependence and strain on the Supreme Court of the United States without in any way threatening that Court with a rivalry.

If it would be helpful, I will try to spin this idea out at greater length, but it seems doubtful that I could do so before the time when your group is scheduled to turn into a pumpkin. Meanwhile, I hope these thoughts may be of some use.

Warm regards,

A handwritten signature in cursive script, appearing to read "Paul".

Chadwick Professor of Law

cc: Meador (Virginia)  
✓ Rosenberg (Columbia)

UNIVERSITY OF VIRGINIA

CHARLOTTESVILLE · VIRGINIA · 22901

SCHOOL OF LAW

DANIEL J. MEADOR  
JAMES MONROE PROFESSOR OF LAW  
804/924-3947

June 8, 1989

The Honorable Levin H. Campbell  
U.S. Court of Appeals, First Circuit  
1618 John W. McCormack Post Office  
and Courthouse  
Boston, MA 02109

Re: Federal Courts Study Committee - Subcommittee on Structure

Dear Lee:

In the wake of the subcommittee and full committee discussions on Monday, I am taking the liberty of setting out some thoughts that occur to me concerning the major priority items on the subcommittee agenda. These are being set down hastily, and they would no doubt profit from further discussion.

Appellate Structure

As you pointed out, it is important to identify what our concerns are here. It seems to me that there are three objectives that the federal appellate system should serve. For short, these involve quantity, quality, and harmony. Currently there are problems with all three, and they are sure to worsen if the body of appeals continues to rise.

Quantity. The objective here is to provide an appellate system that can handle the quantity of appellate business with reasonable dispatch. Losing litigants should be able to obtain appellate review within a reasonable time and without undue delay. The quantitative output of the appellate courts can be increased by three means: reducing the intake of cases at the trial level (jurisdictional restrictions), accelerating the process of deciding cases, and increasing the number of judges. Jurisdictional restrictions at the trial level will, I gather, be addressed to some extent by the full committee, although I do not look for dramatic cutbacks in that regard. Even if there are some curtailments, the overall growth in litigation is likely to gradually offset those reductions. As to expediting the process, I am persuaded that we have gone about as far as we can in truncating procedures and in using law clerks and staff attorneys. There may be some additional tinkering that can be done in this regard, but I do not look for it to produce large results. This leaves the necessity of adding judges to the appellate courts as the most likely--and probably necessary--means of enabling the appellate courts to stay abreast of the quantity of business and avoiding unreasonable delay.



Quality. This reflects a concern that appeals receive the kind of deliberative, thoughtful attention of judges that we traditionally associate with appellate decision making. Here again I am left with the view that increasing the number of judges is likely to be the only way to improve the quality of the process and to hope to restore it to something like the deliberative nature that characterized the appellate courts of thirty and more years ago. Judge Howard Markey's recent article in the South Dakota Law Review is quite good, and I suggest that copies be sent to the sub-committee members.

Thus, as I tentatively see it, meeting the problems of quantity and quality will likely require that additional U.S. Circuit judgeships be created. The natural growth of litigation in the federal system will also push in that direction. Yet, to add more appellate judges into the existing structure will increase the threat of disharmony and unevenness in federal decisional law. This brings us to the third objective that the system should serve--the maintenance of decisional harmony on federal law throughout the United States.

Decisional Harmony. If the members of the committee can reach a consensus about the foregoing points, then attention can be directed to developing a structure and organization for the intermediate appellate tier that will make it possible for the system to employ a large number of appellate judges and yet avoid an undesirable level of inconsistency in appellate adjudication. One of the premises necessary for committee members to accept is that the present system, even as it is, and especially if more judges are added to appellate courts, is not one that can achieve this objective. An array of empirical data point to this. Even if it were not for the empirical data that we have, common sense will tell us this. The Supreme Court--consisting of nine justices--is the only entity we have today in the federal system able to maintain nationwide coherence in federal decisional law among 13 U.S. courts of appeals (with 168 judges), 50 state supreme courts, the District of Columbia, and Puerto Rico. Thus, the Supreme Court presides over 65 appellate courts, all adjudicating federal law questions. It is simply impossible to believe that there will not be disharmony among those adjudications.

I hope that the committee members will come to accept these premises and can thus focus on constructive, new arrangements. To my mind, the most promising, long range approach is to undertake to redesign the intermediate appellate level itself so as to avoid or minimize conflicts; if conflicts never arise, then this also eases the burden on the Supreme Court and enables it to perform its function better. This approach is quite different from that involved in proposals to create a National Court of Appeals or an Inter-Circuit Tribunal. Those proposals presuppose the continuation of the regionalization of the intermediate appellate tier and aim to provide a device to resolve the conflicts that such a geographical arrangement will inevitably generate. It seems better to me to devise a system that will substantially reduce the conflicts in the first place.

To do this within the intermediate appellate tier it is necessary to break out of the exclusively regional mold. We have already done this to a limited extent with the creation of the Federal Circuit. In other words, we need to create more non-regional forums--courts in the

intermediate tier which can review certain categories of cases on a nationwide basis. I see three ways to accomplish this.

First is to use existing courts to which would be routed additional categories of cases. The two most obvious courts that could be used for this purpose are the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Appeals for the D.C. Circuit. The Federal Circuit already exercises jurisdiction nationwide in numerous categories of cases. The D.C. Circuit, as a practical matter, has a very high proportion of certain administrative agency cases, to the exclusion of most other circuits. It could be made the exclusive forum for certain additional categories. I am not urging this as the most promising solution, but it is a distinct possibility.

A second way to develop nationwide review is to combine the existing regional system with the creation of additional non-regional forums. Indeed, we already have an example of this with the Federal Circuit coexisting with regional circuits. Additional courts of that type could be created, with allocations of certain subject matter categories of cases to them, while leaving other categories with the regional appellate courts.

The third way to move in this direction is that suggested by Judge Weis in the full committee meeting and which is discussed in Paul Carrington's letter to Judge Weis. This would be to create a single United States Court of Appeals, consisting of all 168 circuit judges, plus all new circuit judgeships to be created. This court would be authorized to govern itself internally, with authorization to create divisions of varied sorts. Paul Carrington's letter sets out a sophisticated scheme for local, regional panels combined with special panels of nationwide jurisdiction. That proposal is interesting and deserves some fleshing out. Another way that this could be done would be to create regional panels for certain categories of cases with non-regional panels for certain other categories of cases. It will be useful for the subcommittee to focus on these two models. This scheme would provide maximum flexibility to manage the federal appellate business and thus in the long run may be the most promising way to go.

Incidentally, I find the use of the word "specialize" to be misleading. I prefer to use such terms as "subject matter" courts or "non-regional" courts. The major objective to be achieved here is the establishment of an appellate forum to which all cases of a certain type would go, thereby avoiding any possibility of conflict in that category of case. This would not necessarily create a specialized court. Indeed, it would be desirable for judges to which subject matter categories would be assigned to have more than one subject matter and to participate in a variety of judicial business, thereby avoiding what are perceived to be the undesirable features of a specialized court. While judges sitting on such courts would inevitably develop a higher degree of expertise in the fields assigned exclusively to them, they would hardly be specialist within any normal meaning of that term.

### Long Range Planning Entity for the Judiciary

I agree that one of the most important things that the Federal Courts Study Committee can do is to develop a recommendation as to some permanent, long range planning body for the federal judiciary. This suggestion has been around now since the mid-1970's. The suggestion has most often involved the creation of an inter-branch body, composed of representatives from the three branches of the government as well as some from the public sector. However, I have come to learn that there are those who think that such a long-range planning entity should be exclusively the business of the federal judiciary itself. There are some advantages and disadvantages to each of these arrangements. It seems possible to design an entity that might incorporate the best features of both. I hereby set out one suggestion to that end.

There could be created within the federal judicial branch an "office of judicial policy planning." This office would be headed by a director, who would be a highly confident, experienced lawyer--or former judge--appointed by the judicial conference of the United States. This person would have a small staff of persons knowledgeable in the judiciary. This office would engage in year round, long-range planning and would be the secretariat for a body that might be entitled "the Federal Judicial Planning Commission." This body could consist of 12 or 15 persons drawn in about equal parts from the three branches of the federal government and the public sector. The real work and development of data and ideas would take place in the Office of Judicial Policy Planning but the commission would meet periodically to consider those ideas--and even to develop some of its own--which it would eventually formulate as recommendations to the Congress or to whatever other departments of government may be appropriate.

I am not clear how such a long range planning body for the judiciary would mesh with the entity apparently being proposed by Judge Posner's subcommittee, as described by Larry Kramer. His description suggested that that body would be more concerned with identifying substantive law matters that needed clarification by Congress and with being alert for ramifications on the judiciary of various statutory measures being considered by Congress. However, the relationship of these two bodies would need to be considered. Kramer's description did not seem to include long-range planning for the judiciary.

### Non-Article III Personnel and Courts

Rather than consider magistrates or special masters in isolation, it seems to me that the time is appropriate to take stock of the entire realm of non-Article III adjudicatory personnel. I refer here to all of those persons who are involved in adjudicating cases--either within the federal judiciary or outside of it--who are not Article III judges. These include not only magistrates and special masters and bankruptcy judges (all of whom are within the federal judicial structure itself), but all of those Article I forums engaged in business essentially indistinguishable from that being engaged in by Article III courts--Claims Court, Tax Court, Court Of Veterans' Appeals, and Court of Military Appeals. What is the rationalizing principle

The Honorable Levin H. Campbell  
June 8, 1989  
Page Five

by which we assign some judicial business to Article III judges and other judicial business to non-Article III judges? Why are some of these non-Article III personnel within the judicial branch while others are outside the judicial branch? For the long run, would it not be desirable to develop some principle by which these allocations could rationally be made? It may be that this is too nettlesome a problem to resolve, but I hope it at least gets focused upon for some discussion. Perhaps the committee could lay down some general guideline for Congress to follow in the future as it creates new positions to meet increases in judicial business of various kinds.

Finally, I offer an observation about "bullets." While I sympathize entirely with the objective of getting from the full committee some tentative reading of its disposition on various issues, I am fearful that putting before the full committee simply "bullets" is likely to obtain unthinking, knee jerk reactions. I fear that it will shortcut the kind of careful, deliberative process we would hope to obtain from this committee. Such bullets may be useful after the full committee has had the benefit of explanations and data addressed to various proposals. It is the unexplained bullet that I fear, so I hope that we can avoid such an approach on the more sophisticated, complicated problems such as that in appellate structuring.

I look forward to receiving future mailings.

Sincerely,



Daniel J. Meador

DJM/ebg

cc: Structure Subcommittee Members and Advisors  
Judge Joseph Weis  
Denis Hauptley



UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

LEVIN H. CAMPBELL  
CHIEF JUDGE

1618 U.S. COURTHOUSE  
BOSTON, MASSACHUSETTS 02109

July 18, 1989

Professor Daniel J. Meador  
University of Virginia School of Law  
Charlottesville, Virginia 22901

Dear Dan:

I enjoyed reading the galley of your forthcoming article in the University of Chicago Law Review. It is an important piece; I passed it to Judge Breyer (as the two of us sat on a grounded flight between Washington and Boston) observing that I thought that this put into focus much of the current thinking. Much of my concern, presently, is how to stimulate all of us to think more deeply about these issues. Reading your article would be a good first step, since it is so well expressed and covers, comprehensively, many of the issues that must be addressed however one comes out. I am sending a copy to our subcommittee.

This does not mean that I am yet ready to agree with all your proposals. I even continue to debate with myself over the relative seriousness of inter-circuit conflict. Perhaps you are right that we are so immersed that we have become insensitive to the need for clarity — like residents of a smog-ridden city who have forgotten the smell and taste of clean air. I asked Judge Breyer if he felt there was a way to determine the contribution that inter-circuit conflicts made to the sum total of legal "incoherence", and to quantify the social costs. Perhaps we could look at the work being done in a few selected law firms and corporate attorneys' offices and see how great a volume of it is attributable to confusion over legal doctrine caused by courts' failure to agree. Surely other causes of legal expense, will be (a) unclear opinions; (b) unclear statutes; (c) poor lawyers; (d) no laws; and (e) no applicable opinions, etc. Actual conflicts may be but a small part of the problems that breed complexity and confusion. Yet there is probably more to it than that.

Another difficult question is intra-circuit disparity.

And a third is the effect of size on the collegiality and workings of circuit courts. The 13 Eleventh Circuit judges are so

fearful of the adverse effects of adding new judges that they refuse to do so in the face of a very crowded docket. But many of the Ninth Circuit judges I talked to love the size of their court. I feel the Eleventh Circuit judges still have a concept of a single court called the Eleventh Circuit, with a personality of its own. They speak of how the old Fifth could not have done its job in the civil rights crisis if it had had over fifteen judges. (Asked why, if the Fifth Circuit could work effectively with 15, the Eleventh draws the line at 13, I was told they'd accept 15 if sure the growth would end there.) Yet the Ninth Circuit seems to live comfortably with the concept that the circuit is doing its job so long as it provides an infrastructure for three judge panels. What all this means, concretely, in terms of the relative abilities of the two circuits to provide judicial services to the public is not clear. Perhaps the concept in the Eleventh Circuit judges' minds (of a compact, intimate court) has little to do with that court's ability to do its job. Perhaps the Ninth is overlooking some problems. It's all very hard to pin down since, except for the Ninth's greater time in disposing of appeals (14 months as opposed to 8 or 9), there are no dramatic indications (like growing backlogs, vast warehouses of undecided cases, etc.) that either circuit is failing to do its job.

In respect to subject-matter courts, let me say this: I personally like the Federal Circuit, and would not worry about having a Tax Court. I question, however, whether there are enough areas of the law lending themselves readily (in our legal and political system) to subject-matter courts to make a very significant impact upon the loads of the circuits. I am not sure that I am persuaded by you that there are not advantages to spreading politically sensitive cases in fields like labor law among various courts in separate geographic areas. When I talked with Pat Wald, she pointed out the speed with which the personnel of a single court can be altered — a number of people reaching retirement age at once, key people all succumbing to bad health at once, etc. I think there is something to be said for dividing the power among different tribunals as a hedge against the deterioration or coloration of one. I also wonder if putting judges on a single court that oversees an agency (even a court that does other things) may not encourage the activist judge who wants to run the agency. Administrative law is pretty dull as a procedural matter. It is pretty interesting, doing what some think the agency is supposed to do, if you can make national policy on broadcast licensing or the like. Past members of the D.C. Circuit



were sometimes thought to succumb to such substantive interests, for good or bad. I just raise the question.

Finally, let me say I like Professor Carrington's concept of consolidating our appellate system (under the Supreme Court) but I have qualms about a single appellate court. Specifically, I think a single national appellate court might be a standing invitation to some of the worst features of bureaucracy. Given the size of our nation, some division in regions may be a good idea. But I agree the present circuit divisions, by now a historical accident, are a crazy-quilt. Their lack of structure may increasingly be a deterrent to adding judges which, I believe, must be done as the caseload goes up. (The worst result of all would be to keep the same number of judges and try to take up the slack with staff.)

I wonder what you think of another possible structure. To set the stage, I shall start with the proposition that we abolish all present circuits. Writing on a clean slate, we next divide the nation into four regions, by assigning as many states as it takes for each region to end up with four geographical divisions of roughly equal populations. At the apex of each of the four regions will be a Court of Appeals composed of approximately five to seven judges. These four Courts of Appeals will become the nation's leading (Federal) appellate courts, under the Supreme Court. Each will take appeals from the secondary appellate courts (the "circuit courts", see below) within its own region, by certiorari, and each may, if it chooses, also "reach down" and take appeals from the district courts so as to by-pass the circuit appellate courts.

Within each region, besides the top-tier court of appeals, there will be a system of circuit appellate courts. I anticipate that each of the nation's four regions will be subdivided into from five to seven regional circuits each. In each circuit there will be a circuit appeals court composed of from 6-9 judges. Thus each circuit might look much like today's First Circuit, although, given the dominant position of the Court of

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\*The "reach-down" concept has been working well in Massachusetts as a device to save time and expense where issues surface that everyone knows will require disposition by the state's highest court rather than by the intermediate appeals court.

Appeals at the apex, the circuit courts will have more the flavor of a state intermediate appeals court. A circuit court will sit in panels of three, be largely self-governing, and will perhaps be the level at which circuit council functions relative to the district courts will be exercised. As the caseload grows, the number of these circuits may be increased in a given region, so as to keep the number of judges within each circuit limited to nine. This will enable each circuit court to exercise good control over its internal precedent. Meanwhile the upper-echelon Court of Appeals, one tier above, will resolve conflicts between the five or six (or seven) circuits within its region. As I have said, the Court of Appeals will only take cases at its discretion, by certiorari. Most appeals will, therefore, end at the circuit level. Appeals of right will be to the circuits. Thereafter, only a relatively few cases will go in to the Court of Appeals, and many fewer still, from that court to the Supreme Court.

Questions will arise as to whether the judges of the Courts of Appeal will be drawn from the circuits (either by rotation of all circuit judges for, say, two year terms, or by some method of selection like seniority), or whether these judges will be appointed by the President.

In my opinion, this model will enable the circuit courts to be small enough (no more than 9 judges) to control their own precedent and for the judges to enjoy the benefits of collegiality. The model will also permit the Court of Appeals (of which there will be but four, nationwide) to control the precedent within each of their four regions. Finally, because there will be but four Courts of Appeals, the Supreme Court can cope with their occasional divergence, one from the other. Some people will object to the extra tier, but for most litigants the extra tier will never be reached. Only those having novel or weighty cases need face the prospect of the extra tier, which may afford redress short of the Supreme Court. Administratively I find this a more rational system than the present. It is similar in some ways to what the states have done, in devising a layer of intermediate appellate courts. Coherence is achieved by inserting the four new Courts of Appeals between the Supreme Court and the reorganized and equalized 6-9 judge "circuits." (the latter should not be historical outgrowth's of today's circuits, but should be entirely redrawn to achieve a logical parity.) This system could handle a greatly increased caseload since it can comfortably provide for double the number of judges in manageable, collegial units.

Professor Daniel J. Meador  
July 18, 1989  
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Well, this at least is the general idea.

Sincerely,

  
Levin H. Campbell  
Chief Judge

enclosure  
\daw

cc: Judge Weis  
J. Vincent Aprile  
Chief Justice Callow  
Morris Harrell  
Senator Howell Heflin/Scott Williams  
Judge Keep  
Denis J. Hauptly  
Chief Judge Clark  
Judge Peckham  
Professor Baker  
Professor Rosenberg  
William K. Slate, II

# **Additional Materials**

## **on**

# **Intercircuit Conflicts**



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Refer to:

October 31, 1989

Office of the General Counsel  
Baltimore MD 21235

Mr. Dennis Hauptley  
1444 I Street, N.W.  
10th Floor  
Washington, D.C. 20005

Re: Federal Courts Study Committee - Inter-Circuit  
Conflicts--INFORMATION

Dear Mr. Hauptley:

Pursuant to your request, we have identified several issues involving Social Security litigation of the Department of Health and Human Services where the circuit courts have issued conflicting decisions which have not been resolved by the Supreme Court. As you may know, the Social Security programs of the Department of Health and Human Services (HHS) are involved in a significant amount of litigation each year. The Department of HHS is very active in requesting the Supreme Court to resolve conflicts in the circuit courts. Still, there are cases where the courts of appeals' decisions clearly conflict, yet Supreme Court review would not be feasible.

An example of such cases can be seen in regard to the issue of awarding Social Security benefits to a "deemed" widow rather than a legal widow. Under Section 216 of the Social Security Act, 42 U.S.C. §416 a widow of a wage earner is eligible for Social Security survivor's benefits if she is the legal surviving spouse. The Social Security Act also provides for survivor's benefits for a "deemed" widow (not the actual legal widow) upon a showing that the widow in good faith went through a marriage ceremony and was not aware that the wage earner was married to another. Section 216(h)(1)(B) of the Act, 42 U.S.C. §416(h)(1)(B). However, if a legal widow is entitled to receive survivor's benefits, a "deemed" spouse cannot. *Id.* Several circuits have read the relevant statute to conclude that if a legal widow was ever entitled to Social Security benefits, the deemed widow cannot be entitled. See Davis v. Califano, 603 F.2d 618 (7th Cir. 1979); Martin v. Harris, 653 F.2d 428 (6th Cir. 1981); White v. Schweiker, 709 F.2d 247 (3d Cir. 1983); Garcia v. Secretary of Health and Human Services, 760 F.2d 224 (1st Cir. 1985). However, despite the statutory language, other circuits have concluded that a "deemed" widow can receive some survivor's benefits under certain circumstances. For example, the Second Circuit has adopted the position that even if the legal widow is entitled to benefits, as long as that entitlement does not use the total



amount of benefits which could be paid to a widow on the wage earner's account (by considering the amount of the legal widow's benefit to be reduced by any retirement benefits she may have earned) a "deemed" widow could receive the remainder as a monthly survivor's benefit. Rosenberg v. Richardson, 538 F.2d 487 (2d Cir. 1986) and Capitano v. Secretary of Health and Human Services, 732 F.2d 1066 (2d Cir. 1984). As a variant of this, the Fifth and Eleventh Circuits have adopted the position that if the legal widow was entitled to benefits at some time in the past, but is not currently entitled, then a deemed widow may be currently entitled to benefits. See Woodson v. Schweiker, 656 F.2d 1169 (5th Cir. 1981); and Gordon v. Bowen, 801 F.2d 1275 (11th Cir. 1986).

Another example of an unresolved conflict can be seen in a Sixth Circuit decision which allows the tribunal (a court or on remand, the Social Security Administration) which awards Social Security benefits to determine the amount of attorney fees for the court and administrative services. Rodriguez v. Bowen, 865 F.2d 739 (6th Cir. 1989) (en banc); Webb v. Richardson, 472 F.2d 529 (6th Cir. 1972). No other circuit follows this approach. See e.g., Wells v. Bowen, 855 F.2d 37 (2d Cir. 1988); Coup v. Heckler, 834 F.2d 313 (3d Cir. 1987).

In another area of Social Security law, the Third Circuit has held that the Appeals Council's (the final administrative decisionmaking body in the Social Security Administration) scope of review is limited to the issues raised by a claimant for Social Security benefits, unless the Appeals Council gives notice that it will consider the entire case prior to the expiration of the 60-days allowed for Appeals Council own-motion review. Powell v. Heckler, 789 F.2d 176 (3d Cir. 1986). Most courts recognize that the Appeals Council is able to review the entire case upon a claimant's request for review. See, e.g., Gordon v. Secretary of Health and Human Services, 856 F.2d 36, 37 (6th Cir. 1988); Bauzo v. Bowen, 803 F.2d 917, 921 (7th Cir. 1986); Mullen v. Bowen, 800 F.2d 535, 545 (6th Cir. 1986); Deters v. Secretary of Health, Education and Welfare, 789 F.2d 1181, 1185 (5th Cir. 1986); Parker v. Bowen, 788 F.2d 1512, 1514 (11th Cir. 1986) (en banc); Kellough v. Heckler, 785 F.2d 1147, 1149 (4th Cir. 1986); Razey v. Heckler, 785 F.2d 1426, 1429 (9th Cir. 1986); Lopez-Cardona v. Secretary of Health and Human Services, 747 F.2d 1081, 1083 (1st Cir. 1984); Baker v. Heckler, 730 F.2d 1147, 1150 (8th Cir. 1984).

We also have found that in the context of class action suits, some circuit conflicts are unsatisfactorily resolved or seemingly ignored. In Linguist v. Bowen, 813 F.2d 884 (1987), aff'g 633 F. Supp. 846 (W.D. Mo. 1986), the Eighth Circuit let stand certification of a nationwide class even though the District of Columbia Circuit had ruled in the Government's favor in a case raising an identical issue. See Burns v.



United States R.R. Retirement Board, 701 F.2d 193 (D.C. Cir. 1983). The Eighth Circuit's decision effectively prohibited the Government from litigating this issue in any other circuit and did not address a conflicting circuit decision, while at the same time allowing the impact of the court order to affect residents of the circuit where a conflicting decision remained as law.

We also note that courts sometimes differ in their formulation of legal standards, and although the language of the courts may differ, there is little substantive difference. The assessment of a claimant's pain testimony, for example, varies by circuit, despite Congress' recent attempt to legislate a national standard. Compare Polaski v. Heckler, 739 F.2d 1320 (order), supplemented, 751 F.2d 943 (8th Cir. 1984), vacated, 476 U.S. 1167 (1986), adhered to on remand, 804 F.2d 456 (8th Cir. 1986), cert. denied, 482 U.S. 827 (1987); and Mullen v. Bowen, 800 F.2d 535, 545 (6th Cir. 1986); and Green v. Schweiker, 732 F.2d 75, 79 (7th Cir. 1984).

These are but examples of some of the varying statements of Social Security law among the circuits. In some cases the amounts in dispute were so nominal as to be unrealistic vehicles for seeking a writ of certiorari.

If I can be of any further assistance, do not hesitate to contact me.

*A. George Lowe*  
A. George Lowe

**CONFLICTS AMONG THE CIRCUITS IN MARITIME CASES**

**Additional Comments and Recommendations of  
The Maritime Law Association of the United States  
To the Federal Courts Study Committee**

**Richard W. Palmer, President  
The Maritime Law Association of the United States**

**David J. Sharpe, Chairman  
Committee on Practice and Procedure  
The Maritime Law Association of the United States**

**August 28, 1989**

**956 Public Ledger Bldg.  
600 Chestnut St.  
Philadelphia, PA 19106**

**Telephone: (215) 625-9900  
FAX: (215) 625-0185**

## CONFLICTS AMONG THE CIRCUITS IN MARITIME CASES

### Background

The statute that created the Federal Courts Study Committee<sup>1</sup> called upon the Study Committee to assess and report on "methods of resolving . . . intercourt conflicts in the courts of appeals."<sup>2</sup> The Study Committee asked the Maritime Law Association of the United States (MLA) for its reactions to a list of Study Committee proposed issues that included intercourt conflicts. On July 28, 1989, MLA President Richard W. Palmer submitted to the Study Committee a document called "Comments and Recommendations," and with respect to intercourt conflicts, the MLA's Comments and Recommendations contained at page 23 this footnote:

64. Here are eight examples: limitation of liability by owners of pleasure vessels; "imminent peril" in general average; seaman's status; conditional dismissal of international cases for forum non conveniens; equity jurisdiction in admiralty cases; due diligence under COGSA and the Fire Statute; prejudgment interest in personal injury cases; compelling parties' attendance at summary trials.<sup>3</sup> Citations and discussion will be furnished upon request by the Study Committee.

The Study Committee having accepted the MLA's offer, this memorandum seeks to furnish citations<sup>4</sup> and discuss the issues on which the circuits differ. There are other conflicts among the circuits in maritime cases.

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<sup>1</sup> The Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, Title I, 102 Stat. 4644 (Nov. 19, 1988), 28 U.S.C. § 331 n.

<sup>2</sup> Id. § 102(b)(2)(C).

<sup>3</sup> The last example has been withdrawn for reasons discussed below, but another example has been substituted, Effect of Settling Defendant's Payment on Judgment Defendant's Amount.

<sup>4</sup> The citations include American Maritime Cases (AMC), the specialized reporter familiar to the maritime bar. Citations to Supreme Court orders on petitions for certiorari have been underlined for emphasis, but the petitions have not been examined for the points on which review was sought.

For a model conflict, the circuits would have developed opposing rules, and the Supreme Court would have denied a petition for certiorari in a case on each side, as it has done in Example 3, Seaman's Status. However, so far as the Supreme Court is concerned, a certworthy conflict can exist without any prior Supreme Court response.<sup>5</sup>

### 1. Limitation of Liability by Owners of Pleasure Vessels

The Limitation of Shipowners' Liability Act<sup>6</sup> has its constitutional foundation<sup>7</sup> in a phrase that says nothing about pleasure vessels, "Cases of admiralty and maritime Jurisdiction." The Act speaks of "vessels" here and there, but nowhere does it address the basic capacity of the owners of pleasure vessels to limit their liability. Commentators have generally favored confining constitutional admiralty jurisdiction, and therefore confining the scope of the Act, to commercial contexts.<sup>8</sup>

The conflict exists between the Sixth Circuit<sup>9</sup> and the Seventh Circuit.<sup>10</sup>

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<sup>5</sup> See Sup. Ct. R. 17.1(a).

<sup>6</sup> 46 U.S.C. §§ 183-189 (no enacted title).

<sup>7</sup> Art. III, § 2.

<sup>8</sup> E.g., Carnilla & Drzal, *Foremost Insurance Co. v. Richardson: If This Is Water, It Must Be Admiralty*, 59 Wash. L. Rev. 1 (1983).

<sup>9</sup> *Endsley v. Young*, 872 F.2d 176, 1989 AMC 1217 (1989), adhering to *Feige v. Hurley*, 89 F.2d 575, 1937 AMC 913 (6th Cir. 1937) (pleasure vessel owners may limit under the statute).

<sup>10</sup> *In re Sisson (The Ultorian)*, 867 F.2d 341, 1989 AMC 609 (1989) (no admiralty jurisdiction over pleasure vessels, therefore statute cannot apply); petition for cert. filed sub nom. *Sisson v. Ruby*, 58 U.S.L. Week 3037 (No. 88-2041) (June 14, 1989); brief amicus curiae of the MLA in support of the petition for cert. filed July 12, 1989; the petition goes to conference Sep. 21, 1989.

## 2. "Imminent Peril" in General Average

General average is a doctrine of maritime law under which the owners of ships and cargoes agree to share, in proportion to the value of their interests, certain losses and expenses that the shipowner voluntarily incurs after commencement of the voyage of a seaworthy vessel in order to complete the voyage safely. The details of general average are restated by the York-Antwerp Rules, which were created by private international agreement, not by treaty or statute. The "lettered rules" A through G treat situations that the "numbered rules" I through XXII do not govern. Lettered rule A speaks of "peril"; Rules X and XI deal with expenses associated with repairs made necessary for "safe prosecution of the voyage" but say nothing about "peril."<sup>10A</sup>

The conflict exists between the Second Circuit<sup>11</sup> and the Fifth Circuit.<sup>12</sup>

## 3. Seaman's Status

Under United States law, both decisional and statutory, the seaman is the virtual "ward of admiralty," and the seaman's employer and the vessel share the burdens of guardianship when the seaman becomes disabled or dies in the service of the ship. Where specialized vessels perform exotic tasks often performed on land, such as drilling for oil under the ocean, it has been difficult to determine whether a worker aboard to assist in the exotic task qualifies as a seaman.

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<sup>10A</sup> Healy and Sharpe, Cases on Admiralty, 2d Ed. (1986) p. 715.

<sup>11</sup> Eagle Terminal Tankers, Inc. v. Insurance Co. of the U.S.S.R., Ltd., 637 F.2d 890, 1981 AMC 137 (1981) (general average imposed though no peril was imminent).

<sup>12</sup> Orient Mid East Lines, Inc. v. A Shipment of Rice, 496 F.2d 1032, 1038, 1974 AMC 2593 (1974), cert. denied, 420 U.S. 1005 (1975) (general average denied because peril was not imminent).



The conflict exists between the Seventh and Fourth Circuits<sup>13</sup> and the Fifth Circuit.<sup>14</sup>

#### 4. Conditional Dismissal of International Cases for Forum Non Conveniens

Where a seaman has been disabled or killed owing to the arguable fault of the employer, but "foreign contacts" have the greater weight to the judge who is considering whether to apply the Jones Act and other United States seamen's claims, the judge may dismiss the action because it would be too inconvenient to try it under foreign law in the United States, upon conditions that seek to guarantee that the foreign plaintiff can proceed in a foreign forum. These cases have arisen in large numbers.<sup>15</sup>

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<sup>13</sup> Johnson v. John F. Beasley Const. Co., 742 F.2d 1054, 1985 AMC 369 (7th 1984), cert. denied, 469 U.S. 1211 (1985) (worker must advance the transportation function and mission of the vessel); Stephenson v. McLean Contracting Co., 863 F.2d 340 (4th Cir. 1988), cert. denied, 109 S.Ct. 2110 (1989) (worker must be one whose duties serve naturally and primarily as an aid to navigation in the broadest sense).

<sup>14</sup> Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1986 AMC 2455 (1986) (en banc) (it is enough that the worker's duties contribute directly to the mission or purpose of the vessel). See Justice White's recent dissents from denial of petitions for certiorari in two cases from the Fifth Circuit: Lormand v. Aries Marine Corp., 108 S. Ct. 739, 1988 AMC 2400 (1988), and International Oilfield Divers, Inc. v. Pickle, 479 U.S. 1059 (1987).

<sup>15</sup> The principal Supreme Court opinion is Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970). The methodology for approaching and resolving the cases has recently been thrown into doubt. See Pan American World Airways, Inc. v. Lopez, 109 S. Ct. 1928 (case no. 3) (1989), granting certiorari, but vacating the judgment sub nom. In re Air Crash Disaster, 821 F.2d 1147, 1987 AMC 2735 (5th Cir. 1987) (en banc), for further consideration in the light of Chan v. Korean Air Lines, Ltd., 109 S. Ct. 1676 (1989)--whose operative facts seem to have little to do with the Fifth Circuit's massive restatement.



The opposite question has also arisen. If United States law clearly covers the harm, may a United States judge still dismiss because of inconvenience to faraway parties and witnesses?

The conflict exists between the Fifth, Ninth, Tenth, and Eleventh Circuits, which have said "No" to dismissal,<sup>16</sup> and the Second Circuit, which has said "Yes."<sup>17</sup>

#### 5. Equity Jurisdiction in Admiralty Cases

When the American states declared their independence from Great Britain, the British High Court of Admiralty did not have jurisdiction in personam,<sup>18</sup> and therefore it had no power to decree the Chancery Court's equitable remedies. In a few years, when the Constitution of the United States extended the judicial power of the United States to "Cases of admiralty and maritime Jurisdiction," every state had common law courts; most states had courts of equity and admiralty jurisdiction; and no one in the early 1800s doubted that a United States district judge had jurisdiction to give a decree in admiralty against a person.

Still, neither the Constitution nor the first Judiciary Act of 1789 attempted to deal with the power of the United States district courts to give equitable remedies in admiralty cases, and no subsequent Judicial

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<sup>16</sup> Nicol v. Gulf Fleet Supply Vessels, Inc., 743 F.2d 289, 293, 1985 AMC 2669 (5th Cir. 1984); Zipfel v. Halliburton Co., 832 F.2d 1477, 1487 (9th Cir. 1987) (the court left unchanged the operative language of its superseded opinion, 820 F.2d 1438, 1448, 1987 AMC 2642, and the recent vacation of its mandate did not alter its position, 861 F.2d 565 (1988)); Needham v. Phillips Petroleum Co., 719 F.2d 1481, 1483 (10th Cir. 1983); and Szumlicz v. Norwegian American Lines, Inc., 698 F.2d 1192 (11th Cir. 1983).

<sup>17</sup> Cruz v. Maritime Co., 702 F.2d 47, 48, 1983 AMC 1615 (1983). See Edelman, Forum Non Conveniens: Its Application in Admiralty Law, 15 J. Mar. L. & Comm. 517 (1984).

<sup>18</sup> Admiralty Court jurisdiction of seaman's wage cases was an acknowledged anomaly. Howe v. Nappier, 98 Eng. Rep. 13 (K.B. 1766).

Code has done so.<sup>19</sup> While the Supreme Court has held that the judge in an admiralty case involving money damages may apply the ancillary equitable remedy of vacating a fraudulent conveyance,<sup>20</sup> neither statute<sup>21</sup> nor rule<sup>22</sup> has subsequently broadened the Supreme Court's holding into the general power of federal courts to give the same equitable remedies "in admiralty" that they could give under the diversity or federal questions jurisdictions.

The conflict exists between the Second Circuit<sup>23</sup> and the Fifth and First Circuits.<sup>24</sup>

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<sup>19</sup> Particular statutes have conferred equitable remedies upon federal courts in admiralty cases. For one example, see the Federal Arbitration Act, 9 U.S.C. §§ 4, 8 (specific performance of agreements to arbitrate future disputes), approved in *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 1932 AMC 161 (1932). For another example, see the Limitation of Shipowners' Liability Act, 46 U.S.C. § 185 (injunction of proceedings in other courts), implemented by Fed. R. Civ. P. Supp. R. F(3) (mechanics of the injunction).

<sup>20</sup> *Swift & Co. Packers v. Compania Colombiana del Caribe*, 339 U.S. 684, 690-692, 1950 AMC 1089 (1950).

<sup>21</sup> Presently 28 U.S.C. § 1333(1).

<sup>22</sup> Compare Fed. R. Civ. P. 1, which unifies the Federal Rules and the old General Admiralty Rules; but under 28 U.S.C. § 2072(b), a Federal Rule cannot make changes in federal court jurisdiction.

<sup>23</sup> See *China Trade & Devel. Corp. v. The Choong Yong*, 837 F.2d 33, 1988 AMC 880 (1987) (because the case was not suitable for an injunction, it was not a suitable case in which to reconsider the court's power to issue an injunction).

<sup>24</sup> See Chief Judge John R. Brown's celebrated dictum in *Compania Anonima Venezolana de Navegacion v. A.J. Perez Export Co.*, 303 F.2d 692, 699, 1962 AMC 1710 (5th Cir. 1962) (equitable subrogation), cert. denied, 371 U.S. 942 (1962):

The Chancellor is no longer fixed to the  
woolsack. He may stride the quarterdeck of  
maritime jurisprudence and, in the role of  
admiralty judge, dispense, as would his

## 6. Due Diligence under COGSA and the Fire Statute

Fire at sea is so fearful a peril to ship and crew that the Congress has never felt that making the carrier liable for crew-caused negligent fire losses to cargo would have a deterrent effect on the crew's negligence; therefore claims for fire losses to cargo must involve fault of the shoreside superiors--the "carrier"--under United States law. Under the Fire Statute of 1851, the owner is not liable unless the fire is caused by the owner's "design or neglect"; negligence of the master or crew does not suffice. 46 U.S.C. § 182. The other relevant statute, the Carriage of Goods by Sea Act (COGSA), excepts carrier and ship from fire-caused loss or damage "unless caused by the actual fault or privity of the carrier," 46 U.S.C. § 1304(2)(b), and a later section provides that the rights of the carrier under the Fire Statute are not affected. 46 U.S.C. § 1308. In defending other types of cargo loss and damage cases, by claiming exoneration from fault or limitation of liability under COGSA § 1304(2), the carrier must first show the exercise of due diligence to make the ship seaworthy under COGSA § 1304(1).

The conflict exists between the Ninth Circuit <sup>25</sup> and the Second Circuit. <sup>26</sup>

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landlocked brother, that which equity and good conscience impels.

See also *Lewis v. The Baune*, 534 F.2d 1115, 1976 AMC 1275 (5th Cir. 1976) (permanent injunction). In the First Circuit, see *Pino v. Protection Maritime Ins. Co.*, 599 F.2d 10, 1979 AMC 2459 (1st Cir. 1979) (preliminary injunction), cert. denied, 444 U.S. 900 (1979).

<sup>25</sup> *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*, 603 F.2d 1327 (1979), cert. denied, 444 U.S. 1012 (1980) (due diligence under COGSA § 1304(1) is a precondition to applying the Fire Statute).

<sup>26</sup> In *re Ta Chi Nav. (Panama) Corp. (The Eurypylus)*, 677 F.2d 225, 1982 AMC 1710 (1982) (COGSA § 1308 explicitly preserves the Fire Statute, and under a pre-COGSA case, *Earle & Stoddard, Inc. v. Ellerman's Wilson Line*, 287 U.S. 420, 1933 AMC 2 (1932), the carrier has no burden to show due diligence before invoking the Fire Statute).

### 7. Prejudgment Interest in Personal Injury Cases

With respect to pecuniary damage elements, the general American rule is that the plaintiff has the burden of persuading the judge to exercise judicial discretion to award prejudgment interest on money that the judgment awards for other elements of damage. Prejudgment interest runs from the date of the event, at the earliest, to the date of the judgment for plaintiff. The maritime rule basically shifts the persuasion burden from plaintiff to defendant: in admiralty, prejudgment interest normally is to be awarded, though the judge has discretion to deny it <sup>27</sup> and to decide when prejudgment interest starts running and to set the rate of interest. <sup>28</sup>

Where the plaintiff's harms are non-pecuniary, so the fact-finder must "liquidate" the damage elements' dollar values by the judgment, the general American rule is that prejudgment interest is not an element of plaintiff's damages. Application of the rule is complicated by differing termination dates for damage elements incorporated in a judgment. Breach of contract and property loss and damage claims normally have terminated by the date of judgment, but damages for pecuniary personal injury claims may continue until putative retirement (loss of earning capacity) or for life (hospital and medical expenses), and damages for non-pecuniary personal injury claims may continue for life (pain and suffering).

The conflict in maritime rules exists between the Fifth Circuit <sup>29</sup> and the Seventh Circuit. <sup>30</sup>

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<sup>27</sup> See *Mitsui & Co. v. American Export Lines, Inc.*, 636 F.2d 807, 823, 1981 AMC 331 (2d Cir. 1981).

<sup>28</sup> See *Columbia Brick Works, Inc. v. Royal Ins. Co.*, 768 F.2d 1066, 1986 AMC 1676 (9th Cir. 1985).

<sup>29</sup> *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237, 1240, 1987 AMC 2038 (5th Cir. 1986) (forbidding prejudgment interest on pain and suffering that arise after the judgment), cert. denied, 479 U.S. 1059 (1987).

<sup>30</sup> *Hillier v. Southern Towing Co.*, 740 F.2d 583, 586, 1985 AMC 2237 (7th Cir. 1984) (reversible error to exclude prejudgment interest on pain, suffering, and loss of society, whether before the judgment or after it), cert. denied, 469 U.S. 1190 (1985).



### 8. Compelling Parties' Attendance at Summary Trials

One substantial and well-known obstacle to alternative dispute resolution is that the forum may lack any means of coercing witnesses to appear, testify, and furnish evidence within their control. The problem arises in maritime arbitrations; however, contrary to the listing in the MLA Comments and Suggestions, the problem does not seem to have given rise to a conflict among the circuit courts, and so it is hereby withdrawn. In order to produce the promised eight conflicts, this paper now presents another conflict not previously listed.

### 9. Effect of Settling Defendant's Payment on Judgment Defendant's Amount

In maritime personal injury and wrongful death actions against two or more defendants, it is common for the plaintiff to settle with the Settling Defendant for a sum of money, leaving the Judgment Defendant to win or lose at trial. What effect has the amount of money that plaintiff received from the Settling Defendant upon the amount of the judgment against the Judgment Defendant? The underlying assumption is that the settlement must be protected, whether it is attacked by a Settling Defendant who settled for too much money,<sup>31</sup> by a plaintiff who settled too cheaply, or by a Judgment Defendant whose judgment was larger than its share of fault.

The oldest and simplest solution was based upon several liability of defendants when there was no need to know their proportions of fault. If the Judgment Defendant was liable to the full amount of the judgment, in order to avoid a windfall to the plaintiff the Judgment Defendant received a credit for the full amount of the settlement. Then in 1975 the United States began to allocate the damages between the parties in proportion to their fault in collision cases.<sup>32</sup>

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<sup>31</sup> Jovovich v. Desco Marine, Inc., 809 F.2d 1529, 1987 AMC 1437 (11th Cir. 1987) (no claim).

<sup>32</sup> United States v. Reliable Transfer Co., 421 U.S. 397, 1975 AMC 541 (1975).

In 1979 the Leger case applied proportional fault to a personal injury case.<sup>33</sup> Thereupon two possibilities existed for the plaintiff: a shortfall if the plaintiff settled with Defendant A for an amount smaller than Defendant A's ultimate proportion of fault,<sup>34</sup> or a windfall if the plaintiff settled with Defendant A for an amount greater than Defendant A's ultimate proportion of fault.<sup>35</sup>

Almost at once the Supreme Court said that whatever might be the rule of proportional fault in collision cases, in personal injury cases the injured plaintiff could still recover the full judgment from any Judgment Defendant.<sup>36</sup> This eliminated a shortfall to the plaintiff where all the defendants were still in the case, but it said nothing about settlements. The Eleventh Circuit then rejected Leger, saying that the Supreme Court had eliminated the risk of a plaintiff's shortfall: after a credit against the judgment amount for settlements, the plaintiff gets judgment in full against every Judgment Defendant, regardless of proportions of fault.<sup>37</sup>

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<sup>33</sup> Leger v. Drilling Well Control, Inc., 592 F.2d 1246, 1980 AMC 288 (5th Cir. 1979).

<sup>34</sup> In Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1988 AMC 2278 (11th Cir. 1987), the plaintiff received \$315,000 from the Settling Defendant for a judgment share worth \$462,948, a shortfall of \$147,948.

<sup>35</sup> In Leger, the plaintiff received \$182,331 from the Settling Defendant for a judgment share worth \$56,817, a windfall of \$125,514.

<sup>36</sup> Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 1979 AMC 1167 (1979). The shipowner, found 20% at fault, had to pay 90% of the plaintiff's damages (the plaintiff was 10% at fault).

<sup>37</sup> Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1988 AMC 2278 (11th Cir. 1987).



Thus the conflict exists between the Fifth Circuit <sup>38</sup> and the Eleventh and First Circuits. <sup>39</sup>

### Conclusion

While none of these maritime conflicts among the circuits has the magnitude of the diversity conflict over the sufficiency of evidence in diversity cases, <sup>40</sup> which the Supreme Court has repeatedly declined to resolve, the MLA feels that the maritime conflicts are important, and that more of them ought to be resolved one way or another.

The Maritime Law Association of the United States acknowledges with much appreciation the continued interest of the Federal Courts Study Committee, and it stands ready to respond to further inquiries.

Respectfully submitted,

Richard W. Palmer, President  
The Maritime Law Association of the United States  
600 Chestnut St.  
Philadelphia, Pennsylvania 19106

David J. Sharpe, Chairman  
Committee on Practice and Procedure  
The Maritime Law Association of the United States

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<sup>38</sup> Leger v. Drilling Well Control, Inc., 592 F.2d 1246, 1980 AMC 288 (5th Cir. 1979) (shortfall risk on plaintiff); query Hernandez v. The Rajaan, 841 F.2d 582, 848 F.2d 498, 1989 AMC 523 (5th Cir. 1988).

<sup>39</sup> Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1988 AMC 2278 (11th Cir. 1987) (windfall risk on Judgment Defendant), cert. denied, 108 S.Ct. 2017 (1988); Joia v. Jo-Ja Service Corp., 817 F.2d 908, 1988 AMC 2259 (1st Cir. 1987) (same), cert. denied, 108 S.Ct. 703 (1988).

<sup>40</sup> See 5A J. Moore, Federal Practice ¶ 50.06 n. 9, which cites cases over time without attempting to account for multiple listings: federal standard of sufficiency, Circuits 2, 3, 4, 5, 7, 8, 9, 10, and 11; state standard, Circuits 2, 3, 5, 6, 7, and 8.

**IV.**

**Administrative**

**and**

**Management Issues**

# Magistrates Issues

# **THE FEDERAL MAGISTRATES SYSTEM**

**Submitted by\***

**Division of Magistrates  
Administrative Office of the U.S. Courts**

**And**

**Committee on the Administration  
of the Federal Magistrates System**

## **Summary**

The office of United States magistrate was established by the Federal Magistrates Act of 1968 and was built upon the foundation of the 175-year old United States commissioner system. The Magistrates Act was enacted by Congress to create a new federal judicial officer who would both: (1) assume all the duties formerly exercised by the commissioners; and (2) conduct a wide range of judicial proceedings to expedite the disposition of the growing civil and criminal caseloads of the United States district courts.

Maximizing the utilization of magistrates presents a major challenge for the future. There are two facets to this challenge. The first involves the continuation of efforts to encourage greater utilization by the minority of courts and judges who do not use their magistrates fully under the existing statutory framework. The second involves an examination of whether statutory or other changes in the system are desirable to facilitate and enhance the utilization of magistrates.

Under-utilization of magistrates appears to fall into two main categories: (1) the volume of work reported by some magistrates appears less than the national averages; and (2) the work handled by some magistrates is concentrated only in a few areas, e.g., social security appeals and prisoner litigation. When the workload of a magistrate is low, three explanations usually emerge. First, the caseload of the court itself may be relatively low, which allows the judges themselves to handle most of the duties. Second, the judges may not have full confidence in the talents of an individual magistrate to handle the responsibilities of the office. Third, the failure to refer duties to magistrates may result from lack of interaction between judges and magistrates.

A more frequent example of under-utilization has been the restrictive use of magistrates by some judges and courts. The

\*Two separate papers were submitted to the Federal Courts Study Committee

civil workload of most magistrates includes a substantial volume of social security appeals and prisoner actions, with some magistrates devoting much more than one-half their time to the review of these cases. A heavy concentration of these types of cases tends to create a specialist position contrary to the generalist concept underlying the magistrates system. To preserve the generalist character of the office, a balanced workload should exist between social security appeals and prisoner actions and other types of cases.

There are some courts and judges who favor greater utilization of magistrates in civil consent cases, but feel restrained under the existing statutory framework. Changes in legislation have been considered in order to increase the frequency of consents. Legislative proposals include: (1) relaxing current consent requirements to permit judges and magistrates to encourage consent to magistrate jurisdiction; (2) presuming consent of the parties unless objected to; and (3) authorizing "original jurisdiction" in certain types of cases, e.g., Article I type claims. In reviewing these proposals, the potential for materially altering the institutional role of magistrates from a "supplementary resource" to a "substitute or para-judge" must be seriously considered.

Additional proposed changes to the magistrates system include: (1) providing magistrates with limited contempt powers; (2) eliminating the requirement of consent in all petty offense cases; (3) if consent in petty offense cases is not eliminated, the filing of a written consent should be eliminated; (4) changing the title of full-time magistrates; and (5) revising senior status procedures for magistrates and implementing a five-year recall provision.

The following positions were reaffirmed: (1) the Judicial Conference should continue to authorize magistrate positions; (2) the district courts should continue to appoint individual magistrates; (3) the present eight-year term of office for full-time magistrates should be maintained; and (4) the Judicial Conference should continue to fix the salaries of magistrates.

The establishment of a new tier of "appellate magistrates" is not endorsed.

### **Recommendations**

Continue to strive for the improved utilization of magistrates through educational programs for judges and enactment of legislation to implement the following proposals: (1) magistrates should be provided limited contempt power; (2) the requirement of consent in all petty offense cases should be eliminated; (3) if consent in petty offense cases is not eliminated, the filing of a written consent should be eliminated; (4) judges and magistrates should be allowed to advise and encourage parties to consent to have a civil cases tried by a magistrate at any time prior to trial; and (5) the title of full-time magistrates should be changed. Also, the use of retired magistrates in a senior status

role should be considered. Any fundamental change, however, must safeguard against undermining the institutional "supplementary" role of magistrates. The challenge is to steer a course between facilitating procedures in order to maximize utilization of magistrates and the unintentional creation of a lower-tiered judicial office with separate and distinct responsibilities.

#### **Comments**

Although neither the Division of Magistrates nor the Committee on the Administration of the Federal Magistrates System requests any assistance or guidance from the Federal Courts Study Committee, any long range plans developed by the committee should address the role of the magistrate in the federal court system.

We have attached a sampling of letters received by the Federal Courts Study Committee on the subject of magistrates. The letters all support some increase in the power and role of magistrates in the federal judiciary. A quick count indicates that more letters were sent to the subcommittee on this subject than any other.



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# **THE FEDERAL MAGISTRATES SYSTEM**

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**Report To The  
Federal Courts Study Committee**

**From The**

**Committee On The  
Administration Of The Federal Magistrates System**

**On The**

**Present State Of The Federal Magistrates System**

**And The**

**Role Of Magistrates Into The Twenty-First Century**

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**June 27, 1989**

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**REPORT OF THE COMMITTEE ON THE ADMINISTRATION  
OF THE  
FEDERAL MAGISTRATES SYSTEM  
TO THE FEDERAL COURTS STUDY COMMITTEE**

**June 27, 1989**

**I. SUMMARY**

At its June 1989 meeting, the Committee on the Administration of the Federal Magistrates System examined the background paper on the magistrates system which was submitted to the Subcommittee on the Structure of the Federal Courts chaired by Chief Judge Levin H. Campbell. The Committee approved the text of the paper. In particular, the Magistrates Committee concurred with the paper's conclusions that the magistrates system is working well and that no fundamental structural changes are necessary.

Several "fine-tuning" adjustments have been recommended by the Magistrates Committee to enhance the utilization of magistrates and to ensure that the office continues to attract high-caliber professionals. These recommendations are set forth in the following materials. The Committee cautions that substantial changes in the jurisdictional authority of magistrates, especially regarding civil consent power, may lead eventually to a role transformation and thus should be considered very carefully.

An abstract of the positions and recommendations adopted by the Magistrates Committee at its June 1989 meeting is set forth below. An extended discussion explaining each topic follows this outline.

The Magistrates Committee reaffirmed the following propositions:

1. *The Judicial Conference should continue to authorize magistrate positions;*
2. *The district courts should continue to appoint individual magistrates;*
3. *The present eight-year term of office for full-time magistrates should be maintained; and*
4. *The Judicial Conference should continue to fix the salaries of magistrates.*

The Magistrates Committee agreed to recommend the enactment of legislation to implement the following proposals:

1. *Magistrates should be provided limited contempt power;*
2. *The requirement of consent in all petty offense cases should be eliminated;*
3. *If consent in petty offense cases is not eliminated, the filing of a written consent should be eliminated;*
4. *Judges and magistrates should be allowed to advise and encourage parties to consent to have a civil case tried by a magistrate at any time prior to trial; and*
5. *The title of full-time magistrates should be changed.*

Finally, the Magistrates Committee disapproved of the establishment of a new tier of "appellate magistrates."

## II. ROLE OF THE JUDICIAL CONFERENCE

The Judicial Conference determines the number, location, and salaries of all magistrate positions, pursuant to applicable statutory provisions and subject to Congressional funding. The Conference oversees the operation of the magistrates system by reviewing and approving rules and regulations issued by the Director of the Administrative Office which govern the administration of the magistrates system. In general, the Conference is responsible for setting the policy, recommending appropriate legislation, reviewing rules of practice, and otherwise supervising the administration of the magistrates system.

The Conference exercises its responsibility with regard to United States magistrates through its Committee on the Administration of the Federal Magistrates System. The Committee has monitored the magistrates system since the inception of the system in 1968. It is now composed of twelve judges—one from each circuit—and three United States magistrates. It meets twice each year, and its staff and counsel functions are performed by the Division of Magistrates of the Administrative Office.

In accordance with one of the provisions of the 1979 amendments to the Federal Magistrates Act, the Judicial Conference issued a report to Congress in December 1981 on the state of the magistrates system. The report examined the essential attributes and the future of the system. The success of the system since 1981 has confirmed most of the report's findings which underpin the present study. The major issues left pending in the 1981 report represent the bulk of the discussions in this report.

The legislative proposals in this report involve issues which have been discussed thoroughly and debated for many years. The Magistrates Committee recognizes that the work of the Federal Courts Study Committee represents an ideal opportunity and vehicle to implement the necessary legislative changes in a timely fashion. By maintaining the essential attributes and adopting some "fine-tuning" adjustments, the magistrates system will enter the twenty-first century continuing its role as an integral component of the federal judiciary.

### III. DISCUSSION

#### A. *The Judicial Conference Should Continue to Authorize Magistrate Positions.*

In accordance with the procedures set forth in 28 U.S.C. § 633, the Judicial Conference establishes full-time and part-time magistrate positions, subject to Congressional funding. It is essential that this authority be maintained in the Judicial Conference. Unlike the time-consuming procedures involved with judgeships, the Conference is able to respond in a timely fashion to the changing and pressing needs of the district courts with respect to magistrate resources. The Conference is also in the best position to evaluate the overall needs of the district courts, and to determine whether they can best be satisfied by the establishment of magistrate positions, law clerks, pro se law clerks, or additional district judgeships.

The rationale for vesting the Judicial Conference with the authority to establish magistrate positions is set forth in the 1967 Senate Report on the Federal Magistrates Act:

These procedures are thought to afford this paramount advantage: all decisions upon the matters in question will be made by the Judicial Conference of the United States, composed of judges of the courts of the United States under the chairmanship of the Chief Justice of the Supreme Court. Insulated from political pressures, yet informed by the report of the Director and the recommendations of local district courts and the circuit judicial councils, the Judicial Conference can be expected to establish a unified national system of U.S. magistrates that will be sensitive to local needs without being the product of merely local interests.

The Judicial Conference carefully scrutinizes requests for additional magistrate resources on an individual case basis. Acting through its Magistrates Committee, the Judicial Conference considers the recommendations of: (1) the appointing district court; (2) the judicial council of the pertinent circuit; and

(3) the Director of the Administrative Office. It also solicits and considers views offered by law enforcement agencies and other interested parties.

The Judicial Conference through its Magistrates Committee reviews reports which contain detailed statistical data and other information on each district whose magistrate resources are being surveyed, including caseload information on the work of the judges and magistrates within a district. In evaluating requests for full-time magistrate positions, the Conference has focused primarily on three factors: (1) the overall workload of the district court and the comparative need of the judges for the assistance of magistrates; (2) the commitment of the court to the effective utilization of magistrates; and (3) the availability of sufficient work of the sort which the judges wish to assign to magistrates to justify the authorization of an additional full-time position. Consideration is also given to other pertinent local conditions.

The deliberations of the Conference on judicial resources take into account whether the needs of the district courts can be satisfied most effectively by additional magistrate positions, additional judgeships, or alternative resources. The Conference also attempts to maintain an appropriate balance between magistrate and judgeship positions.

In sum, twenty years of experience has demonstrated the efficacy of Judicial Conference authorization of new magistrate positions. The 1981 study of the magistrate system concluded that "the Conference has moved cautiously and deliberately in authorizing full-time magistrate positions. It has chosen to build the system on a firm basis, requiring a clear showing of need by the individual district courts and a commitment to the effective use of their judicial resources." The conclusion remains valid today.

#### ***B. The District Courts Should Continue to Appoint Magistrates.***

The Magistrates Act provides for the selection of magistrates by concurrence of a majority of all judges of the district court in accordance with the merit selection panel process established by regulations of the Judicial Conference. The decision to vest the appointment power in the district courts was explained in the 1967 Senate Report on the Federal Magistrates Act:

Your committee considered several modes of appointment, including Presidential appointment with Senate confirmation, and concluded that the appointment procedure established by proposed subsection 631(a) is the most desirable alternative. This conclusion is



based upon two important premises: first, that vesting the appointment power in the persons most familiar with the qualifications of potential appointees will generally result in the selection of the best-qualified candidates to fill vacancies; and second, that there is great wisdom in lodging the appointment power in those who will have the greatest self-interest in securing appointees of the highest available caliber.

Having the judges of the local U.S. district court appoint U.S. magistrates furthers both of these objectives. District court judges will not only be familiar with the professional and personal attributes of lawyers who practice in the district and who regularly appear before the court, but will be anxious to obtain the best-qualified lawyer to fill a vacancy, because only by so doing can they be sure they will have a competent subordinate to assist them in the performance of the court's business.

The foregoing rationale is as applicable today as it was twenty-two years ago. Magistrates are frequently requested to work on only a portion of a district judge's case, e.g., pretrial management or the resolution of discovery disputes. Since district judges control the delegation of duties to their magistrates, duties which would be performed by the judges in the absence of magistrate resources, the judges must have absolute confidence in them. It is essential to leave appointment authority with the district judges, whose enlightened self-interest should prompt them to select candidates of the highest caliber.

*C. The Present Eight-year Term of Office for Full-time Magistrates Should Be Maintained.*

The term of office of full-time magistrates was reviewed by the Magistrates Committee in June 1986 in response to legislative proposals for a retirement plan for fixed-term judicial officers (territorial judges, bankruptcy judges, etc.). The Committee rejected the concept that all fixed-term judicial officers should have a uniform term of office. It was the Committee's view that differences in the nature of the various offices may warrant differences in terms as well as salary and appointment authority and procedures.

The Committee emphatically opposed a change in the magistrates term of office (a fifteen-year term had been suggested by



Congressional staff). The Committee determined that an eight-year reappointment cycle ensures a reasonable degree of accountability adequate to handle poor performance of duties without recourse to formal removal proceedings. The Committee was concerned that in situations where a court under-utilized its magistrate due to its lack of full confidence in the ability and competence of the magistrate, a longer term would unduly prolong the problem. The Committee also expressed its views that the eight-year term provides a reasonable measure of job security and does not affect competent magistrates who are reappointed in most cases to another eight-year term of office.

Passage of the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act provides magistrates with an additional measure of protection. The right to a proportionate annuity under the Act vests after eight years of creditable service. Thus, a magistrate who elects to participate in the new retirement plan has a vested interest even if he or she is not reappointed for an additional term.

**D. *The Judicial Conference Should Continue to Fix the Salaries of Magistrates.***

The salaries of bankruptcy judges and the maximum salaries of magistrates are fixed by statute at 92% of the salary of a district judge. Under the existing salary-setting mechanism, the Judicial Conference establishes salaries of magistrates subject to the statutory ceiling. In accordance with the March 1987 standing resolution of the Judicial Conference on salary parity, any increase in the salary of bankruptcy judges is automatically extended to most full-time magistrates.

Congress explained that in light of variations in the workload of magistrates from one district to another, "it would be inappropriate to set a single salary figure by statute for either full-time or part-time magistrates." In accordance with the legislative intent, not all full-time magistrates are compensated at the statutory maximum rate. For example, the workload at certain national parks is seasonal but requires the full-time attention of a judicial officer during peak periods. A salary greater than the maximum salary authorized for part-time magistrates is necessary to retain a judicial officer presence at such isolated national parks. The salary setting mechanism must continue to accommodate situations of this type. The exercise of sound discretion by the Judicial Conference in fixing salaries enhances the flexibility of the magistrates system, which was designed to be both cost-effective and responsive to the specific needs of the various district courts.

The Judicial Conference has adopted a fourteen tier salary structure for part-time magistrates. The salary levels are based

on the statutory provision which includes "the average number and the nature of matters that have arisen during the immediately preceding period of five years, and that may be expected thereafter to arise... and to such other factors as may be material." (These criteria also apply to full-time magistrates.) For example, a premium may be paid at some locations where a position is needed and the court has experienced difficulties in recruiting and retaining a qualified attorney to serve as a magistrate.

Salary determinations need to be made on an individual basis. If salaries were based on some rigid "workload formula," many of the serious problems encountered with the Commissioner system might return. United States Commissioners were compensated on a fee basis system. Volume and not necessarily the quality of justice administered was sometimes the controlling factor under that system. Dissatisfaction with fee-basis compensation was one of the principal considerations which prompted Congressional reevaluation of the United States Commissioner system and establishment of the federal magistrates system.

Finally, it should be noted that Congress exercises oversight over the salaries of full-time and part-time magistrate positions under the salary-setting process vested in the Judicial Conference. "Congress has not abdicated its responsibility to control salaries of court employees,... since it reviews the salaries established by the Judicial Conference as part of the yearly appropriation process."

#### ***E. Magistrates Should Be Provided With Limited Contempt Powers.***

A magistrate does not have the power to punish for contempt. A magistrate may only certify the facts of the misbehavior, disobedience or resistance to a lawful order and may order the offender to appear before a district judge to show cause why he should not be held in contempt of court. Upon review, an article III judge may impose appropriate punishment.

Although the lack of summary contempt power does not impose a major hardship for most magistrates, it does create problems. One substantial drawback of the existing procedures is the considerable time lag between the contemptuous behavior and the imposition of the sanction. The delay undermines the deterrent effect of the contempt power. Evidence and testimony rapidly become stale by the time a district judge reviews the "cold record." This becomes particularly troublesome when the contumacious behavior consists of objectionable non-verbal gestures or facial expressions. As a result, the authority of a magistrate to control judicial proceedings is weakened.

In 1981, the National Council of Magistrates recommended that the Magistrates Act be amended to give magistrates limited contempt power. During the same period, the Judicial Conference examined the issue and recommended that Congress might wish to consider whether there is a need to extend contempt powers to magistrates, either limited to a specific number of days of incarceration and/or a dollar fine limit.

The Magistrates Committee is cognizant of the substantial controversy engendered by the exercise of summary contempt power by district judges. Extending this power to adjunct judicial officers raises many of the same concerns as well as additional constitutional objections based on the "judicial power" clause of article III. In the course of upholding the constitutionality of the establishment of adjunct judicial officers, including magistrates and bankruptcy judges, several court decisions enumerated certain duties which were deemed as inherently part of article III power. Summary contempt power was mentioned as one of these.

The issue of contempt power was faced recently during the promulgation of rules governing bankruptcy procedures. After considerable study and debate, limited contempt power was extended to bankruptcy judges. (Bankr. Rule 9020.) Under the rule, an order of contempt by a bankruptcy judge is held in abeyance for ten days pending notification to the affected "entity" of an opportunity to object to the order before an article III judge. The order of contempt is subject to de novo review. In drafting the rule, the advisory committee note stated that it "recognizes that bankruptcy judges may not have the power to punish for contempt." The implementation of the rule has not ended the controversy and challenges continue to be asserted.

The contempt procedures governing bankruptcy proceedings would be sufficient to handle misconduct committed outside the presence of a magistrate. The Magistrates Committee is concerned, however, that the lack of power to impose immediate sanctions for misbehavior committed during court proceedings engenders disrespect of the office, and more importantly, undermines the integrity of the judicial proceeding itself. In particularly litigious courts, this inability sometimes serves to embolden counsel to test the ability of a magistrate to control a proceeding. The authority to impose immediate punishment, whether limited solely to a monetary fine or in combination with a short term of incarceration, is the most effective deterrent against such misconduct in the courtrooms.

The Magistrates Committee recommends that magistrates be provided with limited contempt power to punish misbehavior committed in their presence, subject to any constitutional limitations. It also recommends that misconduct committed outside the presence of



a magistrate be punished in accordance with the procedures set forth under the bankruptcy rules.

**F. *The Filing of a Written Consent In Petty Offense Cases Should Be Eliminated.***

In a petty offense case, a magistrate must explain to a defendant his right to a trial before a judge of the district court and may proceed to trial only if the defendant files a written consent waiving such right. During 1988, magistrates handled 76,578 petty offense cases nationwide. Virtually all defendants charged with a petty offense consent to trial before a magistrate. The statutory requirements of an explanation and particularly a written consent impose an administrative inconvenience and added paperwork especially on magistrates with a heavy volume of such cases. Procedures have evolved in most courts which have significantly facilitated the process. Nonetheless, the statutory requirements cause problems, on occasion, which engender unnecessary delays.

In December 1981, the Judicial Conference recommended to Congress that, "The Federal Magistrates Act should be amended to provide that the consent of a defendant in a petty offense case to trial by a magistrate be made merely on the record, without the requirement that it be made in writing." The Conference considered such amendment to be "administratively advantageous," reducing paperwork burdens of the court.

To date, no legislation has been introduced to effect this recommendation. This is attributable more to the lack of a suitable legislative vehicle than to the presence of any identifiable opposition or objection. In addition, most magistrates handle a relatively moderate volume of petty offense cases. The existing written consent procedures, although somewhat cumbersome, do not impose a substantial hardship on them. The problem is acute, however, with those magistrates who handle a heavy petty offense caseload. Eliminating the necessity of the filing of a written consent would be very helpful.

**G. *The Requirement of Consent In All Petty Offense Cases Should Be Eliminated.***

Many of the concerns and justifications regarding the elimination of the filing of a written consent in a petty offense case apply to the elimination of consent altogether in petty offense cases. In general, the consent requirement does not impose a severe hardship on most magistrates who handle a moderate volume of petty offense cases. The burden of the consent requirement, however, falls heavily on those magistrates with large petty offense workloads.

The Magistrates Committee considered this subject in 1985 at the request of the Department of Justice which favored the elimination of consent. The Committee reviewed the history of developments in this area. Unlike the filing of a written consent, the elimination of consent entirely has encountered some opposition. The Judicial Conference favored the elimination of consent during the passage of the 1979 amendments to the Magistrates Act. The Senate approved such a proposal, but the House objected to this provision and reinstated the consent requirement, which eventually was included in the 1979 amendments.

At the Congressional hearings on the 1979 amendments, the American Civil Liberties Union strenuously opposed the elimination of consent on constitutional grounds. Neither the Judicial Conference nor the Senate agreed that the elimination of consent would violate any constitutional rights, primarily on the basis that petty offenses were not considered "crimes" at common law. These offenses were historically subject to summary disposition by officers other than article III judges, such as justices of the peace. (A chronology of actions on this issue is attached as appendix A.)

The Judicial Conference revisited this issue in 1981 as part of an overall assessment of the magistrates system. The report of the Conference affirmed the justifications for eliminating consent in petty offense cases. It refrained from recommending legislation in light of the 1979 Congressional action, however, suggesting only that Congress re-examine the issue. The requirement of consent is not necessary, particularly in light of the enhanced caliber of professionals appointed as magistrates.

H. *Judges and Magistrates Should Be Allowed At Any Time Prior to Trial to Advise and Encourage Parties to Consent to Have a Civil Case Tried By a Magistrate.*

The jurisdictional authority which a magistrate may exercise is extensive and is controlled by the judges of a court. In most situations, such authority amply fulfills the needs of the courts. There are some courts and judges, however, who favor greater utilization of magistrates in civil consent cases, but feel restrained under the existing statutory framework.

The number of civil consent cases handled by magistrates nationwide has grown steadily from 1,933 in 1981 to 5,903 in 1988. Approximately 83% of the civil consent cases in 1988 were terminated without a trial proceeding. Many (if not most) of those cases involved social security appeals or prisoner complaints. In a majority of the districts, parties in other types of cases usually do not consent to the exercise of consent jurisdiction in civil cases by magistrates. Although there are

other reasons for this reluctance, the statutory limitation on attempts to persuade or induce consent plays a significant role in limiting the number of consents.

Under 28 U.S.C. § 636(c), a clerk of court notifies the parties of their right to consent to the exercise of jurisdiction to enter a final order by a magistrate. In most courts, the notification is accomplished merely by including a consent form among other papers and forms sent to the parties at the initiation of the litigation. After the decision of the parties is communicated to the clerk, the Act prohibits a judge or magistrate from persuading or inducing a party to consent to such jurisdiction. The legislative history of the section expresses concern in safeguarding the voluntariness of the consent of the parties. Several Congressmen were wary of judges using their influence as a "velvet blackjack" to divert particularly troublesome cases from their own docket to the docket of a magistrate. In deference to the intent of the Act, many judges have refrained entirely from even mentioning the option to consent to the exercise of this jurisdiction by magistrates at any time.

The present civil consent procedures are very protective of the parties' right to proceed before an article III judge. The relaxation of some of the safeguards would facilitate the use of magistrates in civil cases. The Magistrates Committee considered various proposals to accomplish this objective. It agreed that the best method would be to authorize explicitly judges and magistrates to advise parties on consent to the exercise of such jurisdiction at any time up to trial. The proposal should increase the number of consents in civil cases, and it would not defeat the judges' power to control and limit the number of civil cases referred to magistrates.

In reviewing various other proposals, the Magistrates Committee was concerned over the potential for materially altering the main institutional role of magistrates from a "supplementary" judicial resource to a "substitute or para-judge." If the workload of magistrates was comprised principally of civil consent cases, magistrates would have less time to devote to duties assigned to them by judges. (Assisting judges in their caseload remains the primary function of magistrates today in most courts.) As the number of civil consent cases handled by a magistrate increases, a tendency might develop for the magistrate (and the court) to shift priority from handling duties assigned to the magistrate by the judge (e.g., discovery motions) to the disposition of the magistrate's "own" caseload. Such a development could be expected to come about gradually. It should be anticipated and monitored carefully.

The Magistrates Committee rejected proposals to recognize "original" jurisdiction for magistrates in certain article I type



cases or to presume that consent of the parties in certain types of cases. The Committee was concerned that such changes might transform the magistrates system into a separate and independent tier of the Judiciary.

The concerns of the Committee do not reflect an antipathy against the use of magistrates solely in civil consent cases by individual courts. Rather they are intended only to raise the level of consciousness regarding the potential transformation of the office to ensure that the system's flexibility always remain intact.

Allowing judges and magistrates to encourage parties to consent in civil cases would facilitate a court's use of a magistrate in a duty authorized by the Act for those courts which wish to do so. The courts would retain a high degree of flexibility in using the system and the likelihood of transforming the role of magistrates from "supplementary" to "substitute" resource would be minimized. In the course of enacting legislation governing civil consent cases, however, several Congressmen expressed serious concerns regarding the potential of judges coercing parties to consent. Accordingly, the proposal to relax the existing procedures would need to satisfy these concerns.

#### *I. The Title of Full-Time Magistrates Should Be Changed.*

The title of "magistrate" continues to be controversial. While the system has been in existence for more than twenty years, the public and even parts of the bar remain unfamiliar with this federal office. Many magistrates indicate that the title invariably requires explanation. Misconceptions occur particularly in jurisdictions where the title applies to low level local officials with limited jurisdiction, such as justices of the peace, who sometimes do not even possess law degrees.

Many individual magistrates assert that the unfamiliarity and negative connotations associated with the title impact adversely on their exercise of jurisdiction in civil consent cases. It has often been their experience that the resistance to consent lies with the litigants rather than the attorneys. Magistrates refer to anecdotes regarding the difficulties encountered by attorneys in explaining to their clients the authority of a magistrate vis-a-vis a judge. To what extent the title of the office actually affects the frequency of consents in civil cases is not known. The general adverse impact, however, should be considered among the other concerns and sensitivities associated with a change in title.

The unfamiliarity and misconceptions which attach to the title of magistrate are detrimental to the prestige of the office and undermine efforts to recruit the most talented attorneys to the

office. The Magistrates Committee has monitored this problem carefully and taken measures to remedy it. In December 1988, all chief judges of the district courts were advised that the Committee endorsed the practice of addressing a magistrate as "Judge" or "Your Honor" in the courtroom. On several informal occasions, the members of the Magistrates Committee have also considered whether legislation to change the title should be proposed. A recommendation has been held in abeyance, however, pending a consensus on a new title which would maintain a clear distinction between article III judges and magistrates, yet improve upon the present title.

The Committee noted the historical trend in favor of substituting titles with judge as a suffix in lieu of former titles for other offices, including bankruptcy judge (referee), Claims Court judge (commissioner), and administrative law judge (hearing examiner). The primary issue is to identify a title which maintains a clear distinction between article III judges and magistrates while denoting an accurate description of the office. The title should incorporate the word "judge," but a specific alternative is not proposed. As the title change affects magistrates directly, their views on the subject are due great weight.

The question of title for part-time magistrates presents different considerations. Part-time magistrates play a key role in the federal judiciary. Their presence in outlying, isolated areas, sometimes hundreds of miles from the nearest other federal judicial officer, provides an important judicial resource. Although the services of part-time magistrates are extremely valuable, the character of their office is fundamentally different from the office of full-time magistrate. The authority a part-time magistrate exercises can be wide-ranging, but their duties are usually very limited. Most significantly, the vast majority of these officers rely on the private practice of law as their main means of livelihood. As a result, confusion is generated in the public regarding their role. Congress recognized this problem and expressed a strong preference for the establishment of full-time positions whenever possible. In order to maintain and crystallize the character differences between the two offices, it is recommended that a title change in the office apply only to full-time magistrates. The present title should remain in effect for part-time magistrates.

*J. A New Tier of "Appellate Magistrates" Should Not Be Established.*

In July of 1981 the Magistrates Committee of the Judicial Conference was asked to endorse the concept of establishing a new class of judicial officers called "appellate magistrates." The primary functions of the new positions would be: (1) to prepare reports and recommended dispositions in frivolous appeals; and

(2) to enter orders on the consolidation of appeals, the establishment of schedules, and pre-argument conferences.

The Magistrates Committee declined to endorse the concept. The Committee was concerned that an effort to establish a new class of magistrates by statute might open the possibility that the Congress would make undesired changes in the existing magistrates system. Concern was expressed, too, about the concept that an appellate magistrate, as a subordinate judicial officer, might review the work or otherwise "second guess" the district court. The concerns expressed by the Magistrates Committee appear equally valid today.

As a practical matter, the functions of the "appellate magistrates" described above are being performed at present by the central legal staffs (staff attorneys) of the circuits and by the conference attorney programs which exist in at least five circuits. To a large extent, therefore, the establishment of appellate magistrates might be duplicative of existing resources. It has been proposed that appellate magistrates conduct nisi prius review of cases, of the sort sanctioned by the Supreme Court in Thomas v. Arn, 474 U.S. 140 (1985). In light of the present duties of the staff attorneys, however, there is some question whether this proposal would benefit the appellate courts.

#### IV. CONCLUSIONS

Today's magistrates system is far different from the original system established in 1968, which in turn represented a marked improvement over its predecessor, the United States Commissioner system. The power, the compensation and retirement benefits, and the prestige of the office in general have been considerably enhanced since the inception of the system. The changes in the system have occurred gradually with some of the substantial modifications evolving in intermediate stages. Each of the major changes was subjected to thorough review and analysis which often spanned many years of study. In such cases, the input of the entire judiciary frequently was solicited. This deliberative, consensus-building process has been a key component of the success of the magistrates system.

The recommendations in this report follow this tradition. The legislative proposals were debated extensively, the input of many members and units of the judiciary was solicited, and sufficient time for deliberations has elapsed. The proposed "fine-tuning" adjustments will enhance the office and ensure the continued success of the magistrates system.

Matters Disposed of by U.S. Magistrates  
1977 and 1983 through 1988

Activity	1977	1983	1984	1985	1986	1987	1988	Percent Change 1987/1988
<b>Trial Jurisdiction Cases</b>	<b>103,061</b>	<b>93,513</b>	<b>84,475</b>	<b>90,757</b>	<b>92,269</b>	<b>95,988</b>	<b>89,996<sup>1</sup></b>	<b>-6.2</b>
Misdemeanors Other Than Petty Offenses	17,181	14,504	11,276	13,779	12,298	12,896	13,418	4.0
Petty Offenses	85,880	79,009	73,199	76,978	79,971	83,092	76,578	-7.8
<b>Preliminary Proceedings</b>	<b>105,677</b>	<b>102,450</b>	<b>109,337</b>	<b>120,143</b>	<b>131,070</b>	<b>134,091</b>	<b>143,352</b>	<b>6.9</b>
Search Warrants	5,203	6,555	7,372	9,776	11,202	11,744	14,246	21.3
Arrest Warrants/Summonses	20,467	12,010	12,401	13,178	14,384	14,983	16,408	9.5
Initial Appearances	44,210	40,108	40,209	44,379	45,385	45,571	47,956	5.2
Detention Hearings	--	--	--	4,167	9,444	9,708	11,935	22.9
Bail Reviews	7,975	8,408	8,579	8,051	6,876	7,140	6,665	-6.7
Preliminary Examinations	5,502	4,681	4,854	4,922	5,588	6,104	6,805	11.5
Grand Jury Returns	521	3,179	3,466	3,816	4,188	4,110	4,259	3.6
Arraignments	21,799	22,995	23,646	24,826	27,734	28,827	29,569	2.6
Other	--	4,514	8,810	7,028	6,269	5,904	5,509	-6.7
<b>Additional Duties</b>	<b>74,676</b>	<b>165,506 *</b>	<b>179,807 *</b>	<b>205,692 *</b>	<b>226,575 *</b>	<b>231,029</b>	<b>231,834</b>	<b>0.3</b>
<b>Criminal</b>	<b>17,986</b>	<b>29,252 *</b>	<b>29,957 *</b>	<b>32,670 *</b>	<b>40,311 *</b>	<b>41,515</b>	<b>38,884</b>	<b>-6.3</b>
3 Motions (A)	7,301	18,991	20,637	22,668	26,687	28,379	26,031	-8.3
4 Motions (B)	--	2,339	2,182	2,098	2,731	2,871	2,678	-6.7
(Evidentiary Hearings)	--	916	997	1,146	1,337	1,452	(1,355)	-6.7
Pretrial Conferences	4,787	3,529	2,900	2,837	3,017	3,622	3,462	-4.4
Calendar Calls	--	700	546	1,142	1,727	1,666	1,679	0.8
Other	5,898	2,777	2,695	2,779	4,812	3,525	3,679	4.4
<b>Civil</b>	<b>48,175</b>	<b>118,574 *</b>	<b>132,784 *</b>	<b>154,085 *</b>	<b>162,389 *</b>	<b>162,512</b>	<b>167,486</b>	<b>-3.1</b>
Pretrial Conferences	22,787	29,695	33,207	36,695	40,419	45,167	48,359	7.1
3 Motions (A)	17,687	65,742	72,424	84,529	92,047	94,722	95,953	1.3
4 Motions (B)	--	7,071	6,401	6,968	7,623	7,777	7,655	-1.6
(Evidentiary Hearings)	--	863	1,091	1,298	1,238	1,532	1,784	16.4
Social Security	3,449	6,588	10,534	14,101	11,646	6,714	7,258	8.1
Special Masterships	546	545	599	684	1,079	1,509	1,213	-19.6
Calendar Calls	--	912	967	1,289	2,174	2,173	2,184	0.5
Other	3,706	7,158	7,561	8,521	6,163	2,918	3,080	5.6
<b>Prisoner Litigation</b>	<b>8,515</b>	<b>14,817</b>	<b>18,157</b>	<b>20,235</b>	<b>23,875</b>	<b>27,002</b>	<b>25,464</b>	<b>-5.7</b>
(Evidentiary Hearings)	--	(1,099)	(1,249)	(1,132)	(1,127)	(1,201)	(1,263)	5.2
State Habeas	4,208	5,632	5,450	6,172	6,820	7,184	7,103	-1.1
Federal Habeas	1,529	2,350	2,345	2,290	2,499	2,589	2,542	-1.8
Civil Rights	2,778	10,561	10,362	11,773	14,556	17,229	15,819	-8.2
<b>Civil Consent Cases</b>	<b>--</b>	<b>3,127</b>	<b>3,546</b>	<b>3,717</b>	<b>4,960</b>	<b>4,970</b>	<b>5,903</b>	<b>18.8</b>
<b>Without Trial</b>	<b>--</b>	<b>2,237</b>	<b>2,697</b>	<b>2,924</b>	<b>3,976</b>	<b>4,008</b>	<b>4,914</b>	<b>22.6</b>
Jury Trial	325 <sup>2</sup>	307	305	308	372	459	550	19.8
Non-Jury Trial	--	583	544	485	612	503	439	-12.7

\* Revised.

\*\* Not separately reported.

1 Workload statistics represent a reporting rate of 95%. This figure includes vacant position months.

2 Includes both jury and non-jury trials.

3 Contested case-non-dispositive motions, e.g., discovery motions.

4 Case-dispositive motions, e.g., motions to dismiss or for summary judgment.



U.S. Magistrate Positions  
Authorized by the Judicial Conference  
1972 through 1988

Appendix B

	Year	Total	Full- Time	Part- Time	Combi- nation
1972	Spring . . .	561	90	455	16
	Fall . . . . .	572	103	452	17
1973	Spring . . .	567	103	447	17
	Fall . . . . .	542	112	414	16
1974	Spring . . .	541	112	411	18
	Fall . . . . .	482	130	336	16
1975	Spring . . .	487	133	337	17
	Fall . . . . .	482	143	322	17
1976	Spring . . .	482	150	316	16
	Fall . . . . .	483	159	306	18
1977	Spring . . .	487	164	305	18
	Fall . . . . .	484	166	300	18
1978	Spring . . .	487	176	290	21
	Fall . . . . .	486	187	278	21
1979	Spring . . .	488	196	271	21
	Fall . . . . .	485	201	264	20
1980	Spring . . .	488	204	263	21
	Fall . . . . .	495	210	263	22
1981	Spring . . .	490	217	253	20
	Fall . . . . .	489	219	250	20
1982	Spring . . .	483	223	241	19
	Fall . . . . .	482	228	238	16
1983	Spring . . .	476	238	225	13
	Fall . . . . .	478	248	219	11
1984	Spring . . .	457	253	191	13
	Fall . . . . .	462	262	188	12
1985	Spring . . .	467	272	183	12
	Fall . . . . .	468	277	180	11
1986	Spring . . .	467	280	177	10
	Fall . . . . .	465	284	171	10
1987	Spring . . .	467	292	165	10
	Fall . . . . .	466	292	165	9
1988	Spring . . .	470	294	167	9
	Fall . . . . .	472	300	163	9
1989	Spring . . .	477	307	161	9

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LIST OF EXPERTS

1. Honorable Joseph W. Hatchett  
United States Circuit Judge  
Tallahassee, Florida  
Chairman of Magistrates Committee 1987-Present
  
2. Honorable Otto R. Skopil, Jr.  
United States Circuit Judge  
Portland, Oregon  
Chairman of Magistrates Committee 1980-1987
  
3. Mr. Peter G. McCabe  
Assistant Director for Program Management  
Administrative Office of the United States Courts  
Chief of Division of Magistrates 1972-1982

## APPENDIX

### **Congressional and Conference Actions Regarding Consent in Petty Offense Cases**

**August 1966** - Memorandum prepared by the staff of the Subcommittee on Improvements in Judicial Machinery, entitled "The Constitutionality of Trial of Minor Offenses by U.S. Magistrates," stated that the trial of petty offenses by U.S. Commissioners is an example of the exercise of judicial power through officers other than Article III judges. Even though a petty offense historically was not considered a "crime" at common law, it nevertheless is included within

all cases...arising under...the laws of the United States, to which Article III specifies the judicial power shall extend. ...Indeed, it has been suggested that due process requires all Federal crimes to be tried by good-behavior judges. If such a rule exists, however, trial by a good-behavior tenure judge is a right of the defendant, not a restriction on the power of the court to use an official of the court as the tribunal of first instance. Such a right, like any other due process right, is waivable by knowing and intelligent consent to trial before a non-good-behavior official. (emphasis supplied)

In response to a circulation of this memorandum, the subcommittee received letters from Irving Younger, Professor of Law, New York University School of Law; Talbot Smith, U.S. District Judge for the Eastern District of Michigan; Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia; Emory Miles, Esq., Baltimore, Maryland; Jack B. Weinstein, Esq., Columbia University; and Ronald L. Carlson, Assistant Professor of Law, University of Iowa, supporting the constitutionality of the provision of S. 3475 authorizing a magistrate to try petty offense cases based upon consent. Professor Carlson in his letter added that consent would be unnecessary to confer jurisdiction on a magistrate to hear petty offenses because of the constitutional propriety of the delegation to magistrates of petty offense jurisdiction.

- January 1975** - Meeting of the Committee on the Administration of the Federal Magistrates System. The report of the Jurisdiction Subcommittee of the Committee requested approval of its recommendation to eliminate the written consent requirement in petty offense cases. It cited three law review articles and Palmore v. United States as support.
- March 1975** - The Report of the Committee on the Administration of the Federal Magistrates System to the Judicial Conference recommended that the Conference authorize legislation to eliminate the written consent requirement in petty offense cases based upon constitutional grounds (citation to the three law review articles and Palmore v. United States) and administrative grounds.
- March 1975** - The Report of the Proceedings of the Judicial Conference indicated its approval of the Magistrates Committee's recommendation for a draft bill to eliminate the written consent requirement in petty offense cases.
- April 1976** - The Report of the Committee on the Administration of the Criminal Law to the Judicial Conference recommended that the written consent requirement for petty offense cases (infractions and Class B and C misdemeanors) in S. 1 (the revision of the federal criminal code) be limited to Class A misdemeanors. The Committee on the Administration of the Federal Magistrates System approved this recommendation.
- May 1977** - The Judicial Conference authorized transmittal of S. 1612 to the Senate eliminating consent for petty offenses as defined up to \$500 (the bill fails to alter existing ban against magistrates holding trial by jury).
- May 1977** - Letter of transmittal of S. 1612 to the Senate from Rowland Kirks, Director, the Administrative Office of the U.S. Courts, indicating that the consent requirement is constitutionally unnecessary and creates a needless administrative burden.
- June 1977** - Department of Justice transmitted S. 1613 which eliminated the consent requirement, but also permitted magistrates to hear jury trials in criminal cases.
- Prepared Statement of Peter McCabe, Chief, Magistrates Division, the Administrative Office of the United States Courts, concluding that original nonconsensual jurisdiction for magistrates covering petty offense cases would be constitutional (petty offenses historically were not considered "crimes" at common law, and a written waiver is not necessary constitutionally--citing three law review articles and Palmore v. United States) and administratively advantageous (consent requirement is time

consuming and places magistrates in an awkward position, and few petty offenders request full-scale trial before a district judge). In accord: Raymond T. Terlizzi, U.S. Magistrate, Tucson, Arizona.

- Prepared statement of Charles R. Halpern, Executive Director, Council for Public Interest Law, opposing S. 1612 and stating that "the Conference has not made available evidence to determine that the written waiver requirement takes any undue amount of time and that the elimination of such waiver will materially improve efficiency and lessen overloaded dockets." In accord: James F. Hewitt, Federal Public Defender, San Francisco, California ("judicial activity constituting 'final' or 'case dispositive' actions must be consented to by a defendant in a criminal case, since there is clearly a right to ultimate disposition by a district judge"); Shelly Siegel, Federal Public Defender, District of New Jersey ("while petty offenses arguably are not 'crimes' at common law, such cases involve the exercise of 'judicial power' pursuant to Article III, thus requiring that the standards and procedures conform to Article III"); and, John H.F. Shattuck, Director, American Civil Liberties Union, Washington Office.

**September 1977** - Report of the Committee on the Administration of the Federal Magistrates System to the Judicial Conference recommending endorsement of S. 1613, which includes a provision eliminating consent.

**September 1977** - Report of the Proceedings of the Judicial Conference of the United States, approving most provisions of S. 1613 but requesting further study of several proposals relating to 28 U.S.C. § 636(c). It later examined the issue of jury trials and found no constitutional impediment to prevent parties from freely consenting to have a magistrate try a misdemeanor case before a jury.

**January 1979** - Introduction in the House of Representatives of H.R. 1046, which retains the need for written consent for petty offenses. Introduction in the Senate of S. 237, which eliminates the writing requirement but provides for the option to have an Article III judge hear petty offense cases.

**March 1979** - Prepared statement of Otto R. Skopll, Jr., Chief Judge, U.S. District Court, Portland, Oregon, supporting S. 237 and indicating no perceived dangers in dropping the written consent requirement.

- Prepared statement of Charles M. Metzner, U.S. District Court Judge, Southern District of New York, indicating that the Judicial Conference endorses the proposal of S. 237. To the extent that S. 237 eliminates written

consent requirement) differs from H.R. 1046 (retains written consent requirement), the Conference supports S. 237.

In accord: Macey Taylor, Magistrate, State of Alabama, who added that total elimination of the consent requirement would be constitutional given the limited severity of most petty offenses and the fact that many of them arise on Federal enclaves.

- Prepared statement of Karen Christensen, Legislative Counsel, American Civil Liberties Union, opposing the provision of S. 237 allowing a magistrate to proceed unless the defendant demands trial before a district judge on constitutional grounds and urging its replacement with the existing written consent provision. Elimination of the writing requirement on administrative grounds is insufficient justification for adopting a constitutionally suspect departure from current laws.

March 1979

- Prepared statement of Daniel Meader, Assistant Attorney General, Office for Improvements in the Administration of Justice, comparing the provisions of H.R. 1046 (requires written waiver of the right to a district judge) and S. 237 (does not require written waiver, but directs the court to inform the defendant of his right.)
- Letter from John H. F. Shattuck, Director, American Civil Liberties Union Washington Office, supporting H.R. 1046 and its provision for consensual jurisdiction in criminal misdemeanor cases.
- Letter from Charles N. Sturtevant, III, Esq., Hartford, Connecticut, supporting elimination of the consent requirement to ease the overburdened court dockets.

April 1979

- Senate report stated that S. 237 as amended retains the written consent requirement because "further empirical evidence of how the magistrate system works is necessary before removing written consent."

June 1979

- House report stated that H.R. 1046 preserves the consent requirement: "Although it arguably is constitutional to remove the requirement, the subcommittee opted for the existing law for two policy reasons" (equitable treatment and no pressing need).

December 1981

- Report to the Congress by the Judicial Conference of the United States recommending elimination of the writing requirement only, and stating:

Elimination of at least the requirement that the waiver/ consent be made in writing would be administratively advantageous. Experience



indeed demonstrates that very few petty offense violators actually request a full scale trial before a district judge or appeal a magistrate's judgment of conviction. A statutory provision should be considered which would retain the right of each defendant to trial by a district judge, while eliminating the burden of executing and processing paperwork. The statute might be amended to retain the obligation of a magistrate to carefully explain the defendants that they have a right to demand trial by a judge, and require only that the defendants' waiver and consent be made on the record but not necessarily in writing.

L. RALPH MECHAM  
DIRECTOR

JAMES E. MACKLIN, JR.  
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN THOMAS JONES  
CHIEF OF THE DIVISION  
OF MAGISTRATES

July 12, 1989

Honorable Levin H. Campbell  
Chairman, Subcommittee On The Structure Of The Federal Courts  
1618 John W. McCormack Post Office and Courthouse  
Boston, Massachusetts 02109

Dear Judge Campbell:

At the request of Judge Joseph W. Hatchett, chairman of the Committee on the Administration of the Federal Magistrates System, I am enclosing a copy of a report on the magistrates system for the consideration of your subcommittee. I have also sent twelve copies of the report to the Honorable Denis J. Hauptly, Reporter for the subcommittee.

If you need any further information on the magistrates system for your subcommittee, please call me.

Sincerely yours,

  
John Thomas Jones  
Chief  
Division of Magistrates

Enclosure

cc: Honorable Joseph F. Weis, Jr.  
Honorable Joseph W. Hatchett  
Honorable Denis J. Hauptly

RECEIVED

JUL 13 1989

CHIEF JUDGE CAMPBELL

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**THE FEDERAL MAGISTRATES SYSTEM**

Report To The  
Subcommittee On Court Structure  
Of The  
Federal Courts Study Committee

Prepared By:  
The Administrative Office of  
the United States Courts  
Division of Magistrates

May 1, 1989

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## THE FEDERAL MAGISTRATES SYSTEM

### PART I

#### OVERVIEW OF THE MAGISTRATES SYSTEM

The office of United States magistrate was established by the Federal Magistrates Act of 1968 and was built upon the foundation of the 175-year old United States commissioner system. Commissioners had been used in the federal courts to try petty offense cases and conduct preliminary proceedings in federal criminal cases. The Magistrates Act was enacted by Congress to create a new federal judicial officer who would both: (1) assume all the duties formerly exercised by the commissioners; and (2) conduct a wide range of judicial proceedings to expedite the disposition of the growing civil and criminal caseloads of the United States district courts.

Unlike many state court systems which feature separate lower-tiered judicial officers with limited powers, the scope of authority of magistrates is not restricted but extends to the full gamut of actions handled by federal courts. The magistrates system was designed this way to provide the federal district courts with a supplementary and flexible resource which could be fashioned in ways best-suited to the particular needs and circumstances of a court.

In general, the jurisdiction which a United States magistrate exercises is the jurisdiction of the district court itself, delegated to the magistrate by the judges of the court under statutory procedures. Today, a magistrate's duties fall generally into four categories:

1. Initial proceedings in criminal cases;
2. References of pretrial matters from judges;
3. Trial of misdemeanors (including petty offenses) upon the consent of the parties; and
4. Trial of civil cases upon the consent of the parties.

In addition to handling the four specific categories of judicial duties above, a magistrate may be assigned any "additional duties as are not inconsistent with the Constitution and laws of the United States." A magistrate may also be called upon to assist the district court in several administrative areas and assist the judges in managing their caseloads.

The specific manner in which the caseload is divided between magistrates and district judges is discretionary with the court. To a large extent, the best way to utilize a magistrate is dependent on two factors: (a) the volume and types of cases filed in a district; and (b) the capabilities of individual magistrates

and judges. Since these factors vary widely, uniformity has never been a goal of the system.

New magistrate positions are established by the Judicial Conference. Individual magistrates are appointed by the judges of the district court. Because judges and magistrates work closely together and the relation between the two officers is so important, it is essential that authority to establish positions and select magistrates remain in the judicial branch. The success of the magistrates system is dependant upon wise decisions by the judges. It is in the judges' best interest to select the best qualified magistrates and utilize them effectively.

The Committee on the Administration of the Federal Magistrates System of the Judicial Conference exercises oversight responsibility for the system. Under the Committee's auspices, several fundamental changes have been accomplished since 1968, including expansion of jurisdiction and improvement in the remuneration of the office. These developments (some of which were achieved only recently) have created an important judicial office with financial benefits adequate to retain and attract high-caliber professionals.

Maximizing the utilization of this judicial resource presents a major challenge for the future. There are two facets to this challenge. The first involves the continuation of efforts to encourage greater utilization by the minority of courts and judges who do not use their magistrates fully under the existing statutory framework. The second involves an examination of whether statutory or other changes in the system are desirable to facilitate and enhance the utilization of magistrates. The lack of a single "ideal" standard of utilization of magistrates significantly complicates the analysis.

## PART II

### OFFICE OF UNITED STATES MAGISTRATE

A United States magistrate is a judicial officer of the district court who is appointed by a majority vote of the judges of the court pursuant to regulations promulgated by the Judicial Conference. A full-time magistrate is appointed for a term of eight-years, while a part-time magistrate serves for a term of four years. Removal from office during a term is permissible only for incompetency, misconduct, neglect of duty, or physical or mental disability.

The 1979 amendments to the Magistrates Act upgraded the qualification standards of applicants for the office. Candidates must have engaged in the active practice of law for at least five



years. In addition, appointments are made through a merit selection panel process which requires public notice. The court selects and appoints a magistrate from a list of five candidates submitted by the merit selection panel.

The Judicial Conference establishes the number of magistrate positions, subject to Congressional funding. After an initial nationwide survey in 1969, the Conference authorized 61 full-time magistrate positions and 449 part-time magistrate positions. Since then, many of the part-time magistrate positions have been eliminated or replaced by full-time magistrate positions, consistent with the Congressional preference for a system of full-time magistrates. As of June 1, 1989, there were 307 full-time magistrate positions and 163 part-time magistrate positions.

The Judicial Conference also sets the salaries of the magistrates, not to exceed 92% of the salary of a district court judge for a full-time magistrate (\$82,340 per annum), and up to \$41,170 per annum for a part-time magistrate. Each full-time magistrate is eligible for one secretary and one law clerk. Part-time magistrates are reimbursed for secretarial and other expenses incurred in the performance of official duties.

### PART III

#### DEVELOPMENT OF THE MAGISTRATES SYSTEM

The history of the magistrates system has been punctuated with several milestones attained after many years of intensive effort. Each milestone presaged the advent of a new set of priorities and directions for the magistrates system. A brief account of these developments illustrates where the system has been and where it is now heading.

##### A. Initial Stage -- Expansion of Jurisdiction

Soon after the inception of the magistrates system in 1968, the limits of the jurisdictional authority of magistrates to handle various proceedings was challenged. In particular, the authority of a magistrate to conduct evidentiary hearings in social security appeals and reviewing case-dispositive motions was attacked. Legislative efforts were undertaken almost immediately to clarify and expand the authority of magistrates to handle such proceedings.

Most of the major challenges were answered by the enactment of the 1976 and 1979 amendments to the Magistrates Act, which were upheld in later court decisions. Under the amendments, magistrates are empowered to conduct evidentiary hearings and enter final orders in any civil case with the consent of the parties. These legislative changes, as ratified by subsequent

court decisions, satisfy the main jurisdictional concerns affecting the system.

The amendments enacted in 1979 also required the Judicial Conference to study and evaluate the effectiveness of the new expansion in authority and the overall effectiveness of the program. In December 1981, the Conference issued a report which concluded that the jurisdictional authority generally was appropriate and that the magistrates program fulfilled the objectives of the Congress, which included:

- (1) upgrading the status and quality of the first echelon of the federal judiciary;
- (2) establishing an effective forum for the disposition of federal misdemeanor cases;
- (3) providing needed assistance to district judges in the disposition of their civil and criminal cases;
- (4) improving access to the federal courts for litigants; and
- (5) providing the courts with a supplementary judicial resource to meet the ebb and flow of their caseload demands.

The support of the Judicial Conference for the magistrates system is built upon the favorable responses of the individual district courts to the work-product of the magistrates. A primary reason for the system's success is that the courts have used the magistrates in a flexible fashion as intended by the Congress.

#### B. Intermediate Stage -- Improvements in Remuneration

After successfully meeting the principal jurisdictional concerns, raising compensation commensurate with the added responsibilities of the office assumed priority. Adequate remuneration for service performed in the office is essential to attract and retain the high-caliber professionals needed to fulfill the increasing demands of the office.

Recruiting and retaining the best candidates for the office has always been crucial because the magistrates system to a large extent is dependent on the "voluntary" assignment of duties from judges. The magistrates system would collapse rapidly if the judges lost full confidence in the abilities of their magistrates. To date, considerable success has been achieved in this area as shown by the appointment of twenty-six former magistrates to Article III judgeships and nineteen magistrates to other judgeships, including two on state supreme courts.

The Judicial Conference has recognized the need for adequate compensation and consistently has endorsed the principle of parity between the salary and other benefits authorized for bankruptcy judges and those for magistrates. From 1983 to 1988,

intensive legislative efforts were devoted to improving salary and retirement benefits for magistrates. The resulting legislation authorized the Judicial Conference to set the salary of a full-time magistrate at 92½ of the salary of a district judge, and under a new retirement program a full-time magistrate is entitled to an annuity equal to the salary of the position at age 65 after completing fourteen years of service.

One of the major purposes of the salary and retirement legislation was to attract more experienced professionals to the office. Studies had shown a trend toward the appointment of magistrates at increasingly earlier ages. The enactment of the retirement legislation is expected to draw more experienced attorneys to the office.

### C. Present Stage -- Focus on Utilization of Magistrates

The enhancement of jurisdiction, salary, and retirement benefits for magistrates provides the courts with an improved, efficient, and effective tool to help in the management of caseloads. The challenge which remains is to maximize this important judicial resource.

As a threshold issue, evaluating how a court uses its magistrates is complicated by the lack of a single "ideal" standard by which to compare and measure objectively a court's procedure. The adaptability of the system rules out any all-purpose, universal standard acknowledged as the "optimum utilization" of magistrates. Each court is subject to unique needs and circumstances.

Empirical data is available to show how magistrates are used nationwide. The reported cumulative workload of magistrates provides a useful framework with which to examine and evaluate the utilization of magistrates on an individual basis. The data is instructive in providing some benchmarks which may help to distinguish between inadequate and full utilization of magistrates.

Each year United States magistrates handle hundreds of thousands of matters which, if there were no magistrates, would have to be handled by life-tenured article III judges. During the year ending June 30, 1988, magistrates completed 89,996 misdemeanor cases, 143,352 preliminary proceedings in felony cases, 231,834 "additional duties," and disposed of 5,903 civil cases on the consent of the parties. (A more detailed breakdown is contained in Appendix A.)

The volume of work handled by magistrates has risen consistently since the inception of the system. The large number of misdemeanors and initial proceedings in felony cases disposed of by magistrates has relieved the judges from handling such

matters, and has provided them with additional time to devote to Article III duties.

Significantly, the growing number of references of "additional duties" under 28 U.S.C. § 636 (b) has represented the largest proportion of the increase of duties referred to magistrates. Such duties are generally more complicated and time-consuming than the traditional duties formerly handled by commissioners. They include, among other things, conducting pretrial conferences, preparing reports and recommendations on motions to dismiss or for summary judgment, and reviewing prisoner petitions and social security appeals. The assistance provided by the magistrates in the disposition of the judge's own cases has expedited the processing of the general caseload of the federal courts. The number of civil cases handled by magistrates pursuant to the consent of the parties, although not large, has grown. The task at hand is to continue improvement in the utilization of magistrates.

#### PART IV

##### CHALLENGES

The determination of the "ideal" utilization of magistrates for any individual court is not susceptible to a simple answer in light of the flexible nature of the system. Nonetheless, it is clear that a small number of courts and judges do not "fully utilize" their magistrates. It is these courts which are of concern to the system.

##### A. Encouraging Greater Utilization

The improvement of the utilization of magistrates has always been a principal goal of the system. One of the earliest studies to concentrate on this issue was conducted by the General Accounting Office (GAO). In July 1983, the GAO issued a report entitled "Potential Benefits of Federal Magistrates System Can Be Better Realized." The report, which contained favorable findings concerning the efficacy of the magistrates system, concluded that the system had become an important and integral component of the federal judiciary. The thrust of the report was to encourage still greater utilization of magistrate resources by the district courts.

The GAO report noted that the assistance provided by the magistrates to the district court judges had contributed clearly to the courts' productivity in the disposition of the mounting caseload. Although such assistance had played an important role in increasing "the output of cases terminated per judgeship," the



GAO report advocated still greater use of magistrates to assist the courts in handling the increasing backlog of pending cases.

The Judicial Conference carefully monitors the utilization of magistrates. Under-utilization of magistrates appears to fall into two main categories: (1) the volume of work reported by some magistrates appears less than the national averages; and (2) the work handled by some magistrates is concentrated only in a few areas, e.g., social security appeals and prisoner litigation. Magistrates report their workloads monthly. Most of the workloads are substantial and wide-ranging. The workload statistics are examined carefully in the course of periodic reviews conducted by the Administrative Office and the Judicial Conference while evaluating the justification for continuing the positions for additional terms of office. The workload statistics are instrumental in identifying under-utilization.

#### 1. Low Volume of Work

Where the workload of a magistrate is low, three explanations usually emerge. First, the caseload of the court itself may be relatively low, which allows the judges themselves to handle most of the duties. The need for magistrate resources correspondingly falls. The number of courts in this category is very low. Second, the judges may not have full confidence in the talents of an individual magistrate to handle the responsibilities of the office. Under this latter circumstance, a court may refuse to reappoint an incumbent to another term or in an extraordinary situation may remove an incumbent from office.

Third, the failure to refer duties to magistrates may result from lack of interaction between judges and magistrates. In courts where judges interact with individual magistrates infrequently, there is a greater proclivity toward limiting the range of duties assigned to magistrates. As a matter of general experience, courts in metropolitan areas have historically maintained more formal divisions between the two offices and the range of duties assigned to magistrates has been narrower. Conversely, where a strong collegial environment exists, the range of duties referred to magistrates is often very wide. Courts in rural areas tend towards greater collegiality between the two offices, and the range of duties often is wide. This tendency is not universal, yet a noticeable pattern has emerged.

The Judicial Conference and the Administrative Office continue to encourage all courts to utilize magistrates fully. Specific segments of programs held during circuit conferences, chief judges' conferences, and metropolitan chief judges' conferences have been devoted to the discussion of full utilization of magistrates. In an effort to promote collegiality between the two offices on an institutional level, the courts also have been encouraged to include magistrates on their advisory committees on

rules or procedures. This effort has been undertaken on a nationwide basis through the appointment of magistrates to separate committees of the Judicial Conference. Consideration might be given to expanding the statutory membership of circuit councils to include magistrates.

## 2. Limited Range of Assignments

A more frequent example of under-utilization has been the restrictive use of magistrates by some judges and courts. Social security appeals and prisoner actions comprise 22% of the civil docket of the district courts nationwide. In some districts, they represent nearly a majority of all civil case filings. The civil workload of most magistrates includes a substantial volume of such cases, with some magistrates devoting much more than one-half their time to the review of such cases.

Unless the parties in social security appeals or prisoner cases agree to a magistrate entering a final order under 28 U.S.C. § 636(c), a magistrate may only report and recommend a disposition to a district court judge. A judge is not bound by the magistrate's recommendation, and may accept, modify, or reject the recommendation. The role of a magistrate in such cases is similar in many respects to a law clerk's. Many of the cases are disposed of entirely on the pleadings without resort to any evidentiary or other hearing. Prisoner actions also are often susceptible to early dismissal based on obvious procedural or jurisdictional defects. These cases are usually well-suited to the attention of a law clerk and have led to the establishment of a prisoner pro se law clerk program devoted solely to such matters.

One of the conclusions drawn in a study by the Federal Judicial Center on the utilization of magistrates substantiated the effectiveness of magistrates in social security appeals and prisoner cases. The study noted that judges adopted the findings of magistrates in the vast majority of these cases and that the parties objected infrequently to the recommendations. The judges who relied heavily on magistrates in such cases were relieved of a large portion of work that they (or their law clerks) otherwise would have been compelled to handle.

In light of the effectiveness of using magistrates in such cases, the reservations which have been raised concern only the efficiency of using magistrates solely in such a role. The problem originates with the nature of these cases, especially prisoner actions. A large percentage of these cases are initiated pro se and are unintelligible and frivolous. Nonetheless, careful scrutiny is demanded of each action. Designating a magistrate to handle all such matters succeeds in developing a specialist who quickly acquires a high level of expertise. It also imposes a strain on the magistrate to review



## A.O. Magistrate's Division Recommendations

constantly such actions, the majority of which are frivolous. On an institutional level, the restrictive use of magistrates in only such cases undermines the character of the office. It creates a specialist position contrary to the generalist concept underlying the magistrates system.

There is no consensus on the wisdom of using magistrates predominantly in such cases. There is some general uneasiness expressed, however, by individual magistrates. Ideally, some type of balance should be reached in the workload of a magistrate between such cases and duties in other civil and criminal cases, to preserve the generalist character of the office. The issue is acute in those districts where the filings of these cases are heavy and the magistrates devote much more than one-half their time to their review.

The ultimate decision on how to use magistrates must be left to the discretion of the courts, who are in the best position to assess the merits of using their magistrates in any given way. On the other hand, the Judicial Conference and the Administrative Office should continue to encourage the courts to monitor and re-examine their utilization of magistrates with a view towards assigning a wider range of duties. Greater study should be directed at alternative resources to assist in these cases, particularly the prisoner pro se law clerk program. Consideration might also be given to the expansion in the number of law clerks to district judges and magistrates used specifically for this purpose.

### PART V

#### STRUCTURAL CHANGES IN THE SYSTEM -- MAXIMIZING UTILIZATION

##### A. Procedures Governing Civil Consent Cases

The jurisdictional authority which a magistrate exercises is extensive and is controlled by the judges of a court. In most situations, such authority amply fulfills the needs of the courts. There are some courts and judges, however, who favor greater utilization of magistrates in civil consent cases, but feel restrained under the existing statutory framework.

The number of civil consent cases handled by magistrates nationwide has grown steadily from 1,933 in 1981 to 5,903 in 1988. Approximately 83 percent of the civil consent cases in 1988 were terminated without a trial proceeding. Many (if not most) of these cases involved social security appeals or prisoner complaints. In most of the districts, parties in other types of cases usually do not consent to the exercise of such jurisdiction by magistrates. Although there are other reasons for this reluctance, the lack of encouragement from the court plays a

salient role. The statutory provisions do not promote parties' consent; rather, they act to restrain it.

Under 28 U.S.C. § 636(c), a clerk of court must notify the parties of their right to consent to the exercise of jurisdiction to enter a final order by a magistrate. After the decision of the parties is communicated to the clerk, the statute prohibits a judge or magistrate from persuading or inducing a party to consent to such jurisdiction. The legislative history of the section expressed concern for safeguarding the voluntariness of the consent of the parties. In deference to the legislative history, many judges refrain entirely from advising parties of their option to consent to the exercise of this jurisdiction by magistrates.

Changes in the legislation have been considered in order to increase the frequency of consents. Legislative proposals include: (1) relaxing current consent requirements to permit judges and magistrates to encourage consent to magistrate jurisdiction; (2) presuming consent of the parties unless objected to; and (3) authorizing "original jurisdiction" in certain types of cases, e.g., Article I type claims. In reviewing these proposals, the potential for materially altering the institutional role of magistrates from a "supplementary resource" to a "substitute or para-judge" should not be lightly dismissed.

Assisting judges in their caseload remains the primary function of magistrates today in most courts. If the workload of magistrates was changed to consist principally of civil consent cases, magistrates would have less time to devote to duties assigned to them by judges. A perception could be raised that the establishment of a magistrate position might be economically and politically more advantageous than the establishment of a judgeship. This would defeat the primary purpose of the magistrates system which was designed as a supplementary and flexible resource of the courts.

These concerns should not suggest that the use of magistrates primarily in civil consent cases by some courts is improper. Indeed several courts have been very successful in using magistrates in such a role, particularly those courts whose judges subscribe to a "hands-on" case-management approach. It is their judgment that greater efficiency is achieved when close control of cases is maintained, including handling all pretrial motions and conferences personally. Consistent with this judicial philosophy, magistrates provide more assistance to these judges by trying their "own" civil consent cases. The flexible nature of the magistrates system accommodates these courts and judges.

The above concerns are intended only to raise the level of consciousness regarding the potential transformation of the office and to ensure that the system's flexibility remains intact. To this end, the incorporation of effective safeguards into any legislative proposal which would control the exercise of such jurisdiction in civil consent cases would be essential to preserve the existing supplementary role of magistrates.

### 1. Relaxing Existing Consent Procedures

The present civil consent procedures are very protective of the parties' rights to proceed before an Article III judge. The relaxation of some of the safeguards would facilitate the use of magistrates in civil cases. Proposals include the following: (1) explicitly authorizing judges and magistrates to encourage parties to consent to the exercise of jurisdiction by magistrates at any time up to trial; and (2) patterning the referral procedures on the provisions of the Bankruptcy Reform Act of 1984 which presume consent unless otherwise objected to by the parties.

Either proposal would facilitate and increase the number of civil case consents. Neither proposal would defeat the judges' power to control and limit the number of these cases referred to magistrates.

The first proposal is very much in line with the intent and design of the Magistrates Act. It would facilitate a court's use of a magistrate in a duty authorized by the Act for those courts which wish to do so. The courts would retain a high degree of flexibility in using the system and the likelihood of transforming the role of magistrates from "supplementary" to "substitute" resource would be minimized. In the course of enacting legislation governing civil consent cases, however, several Congressmen expressed serious concerns regarding the potential for judges coercing parties to consent. Any proposal relaxing existing procedures would need to address these concerns.

The second proposal, which presumes consent, poses the greater danger that trying civil cases would come to outweigh the duties presently delegated to magistrates. As the number of civil consent cases handled by a magistrate increased, a tendency may develop for the magistrate (and the court) to shift priority from handling duties assigned to the magistrate by the judge (e.g. discovery motions) to the disposition of the magistrate's "own" caseload. Such a development could be expected to come about very gradually. Unless anticipated and monitored carefully, a role transformation from "supplementary" judicial resource to "substitute judge" might eventually become entrenched.



## 2. Authorizing "Original Jurisdiction" in Certain Cases

Authorizing magistrates to try cases without the consent of the parties in certain matters has been entertained by a few commentators. Presumably, such power could be extended only to non-article III claims, primarily federally-created remedies under Article I. Crafting appropriate legislative provisions which would disengage such causes of action from ancillary Article III claims could be difficult, as shown by the Bankruptcy Reform Act of 1978. Furthermore, such a provision would act as an inducement to Congress to assign newly created causes of action to magistrates which otherwise might have been referred to an administrative agency or a separate tribunal, e.g., Veterans Appeals Court or the proposed Social Security Appeals Court. As the number of these actions were to increase, so would the potential of transforming the magistrates system into a separate tiered office responsible for handling only Article I type claims.

Some of the above fears would be mitigated by leaving intact the judges' overall power to control and limit the number of such cases referred to magistrates. For example, the local rules of court could specify that only every fourth filing of a specific type of case be referred to the magistrate. Whether this discretion would be effective in keeping the cases in the judges' hands and preventing the automatic referral of these cases by judges to magistrates, particularly if the newly-created cause of action was "unglamorous" or especially tedious, is unclear.

The above concerns were recognized by the Judicial Conference in 1981. In its report to Congress, the Conference emphatically concluded that magistrates should not be given "original" jurisdiction over any category of cases. No intervening development has occurred to alter this conclusion.

### B. Title -- Impact on Civil Consent Cases

The title of "magistrate" continues to be controversial. While the system has been in existence for more than twenty years, the public and even parts of the bar remain unfamiliar with this federal office. In addition, the office has been associated with state officers with the same title who often exercise little judicial responsibility. Efforts at changing the title have been underway for many years. To date, no consensus has been reached on a new title which would maintain a clear distinction between Article III judges and magistrates.

Many individual magistrates assert that the unfamiliarity and negative connotations associated with the title impact adversely on their exercise of jurisdiction in civil consent cases. It has often been their experience that the resistance to consent lies with the litigants rather than the attorneys. Attorneys often

must explain the role of a magistrate to their clients in order to obtain their consent. Even after lengthy explanations, few laymen are able to comprehend the arcane distinctions between an Article III judge and a magistrate.

The extent to which the title of the office actually affects the frequency of consents in civil cases is not known. The general adverse impact, however, should be considered among the many other concerns and sensitivities associated with a change in title.

### C. Petty Offense Cases

In a petty offense case, a magistrate must explain to a defendant his right to a trial before a judge of the district court and may proceed to trial only if the defendant files a written consent waiving such right. Virtually all defendants charged with a petty offense consent to trial before a magistrate. The statutory requirements of an explanation and particularly the requirement of written consent impose an administrative inconvenience and added paperwork on magistrates with a heavy volume of such cases. Procedures have evolved in most courts which have significantly facilitated the process. Nonetheless, the statutory requirements cause problems, on occasion, which engender unnecessary delays.

As part of its 1981 report to Congress on the magistrates system, the Judicial Conference recommended that the consent of a defendant be reflected merely on the record, eliminating the need for the filing of a written consent.

The Conference also suggested that consent in petty offense cases was not necessary. The report referred affirmatively to justifications contained in the Senate version of the 1979 amendments to the Magistrates Act which would have omitted the requirement of consent altogether. The Senate report eliminated the requirement of consent "on the grounds that such waiver/consent was not needed constitutionally, that it lengthened the time needed to hear each case, and that it produced a growing volume of unnecessary paperwork." The House version, which contained the consent requirements, however, was ultimately enacted.

Most magistrates handle a relatively moderate volume of petty offense cases. The existing consent procedures, although somewhat cumbersome, do not impose a substantial hardship on them. The problem becomes acute, however, with those magistrates who handle a heavy petty offense caseload. Eliminating the necessity of filing a written consent would be very helpful. A proposal to eliminate the need for consent entirely would ease the burden further, but would probably be more difficult to enact in light of the legislative history.

#### D. Senior Status/Recall

In 1988, Congress enacted a new retirement plan for magistrates and bankruptcy judges which provides them with an annuity equal to the salary of the position after fourteen years of service at age 65. The annuity is subject to cost-of-living adjustments. The change in retirement benefits underscores the advantages of establishing a procedure to retain the services of retired magistrates, similar in nature to senior status for Article III judges. Under such a procedure, courts would have an opportunity to retain valuable, experienced judicial officers at small additional cost to the Government, mainly staff and office expenses.

At present, a chief judge may request the circuit council to recall a retired magistrate for renewable one-year periods subject to cancellation at any time by the court. The recalled magistrate is entitled to compensation equal to the difference between his retirement annuity and the salary of the office. (A similar provision governs the recall of retired bankruptcy judges, although the circuit council exercises the appointment power.) To date, very few retired magistrates have agreed to be recalled under these "ad hoc" provisions. (For comparison, approximately twenty to twenty-five retired bankruptcy judges have been recalled.)

Magistrates have expressed reservations regarding the indefinite, temporary nature of the "ad hoc" recall. The uncertainty of the term of recall was identified as a major drawback, especially for those magistrates entertaining other employment opportunities at retirement.

In 1987, Congress enacted a statute which authorized the pertinent circuit council to recall eligible retired magistrates for a five-year period. Only magistrates who meet the age and service requirements of the "rule of 80" (minimum age of 65 with 15 years of service) are eligible to be recalled under the five-year provision. Thus, most retired magistrates eligible under the five-year recall provision would also be entitled to receive an annuity equal to the salary of the office under the new retirement plan.

The Judicial Conference has not promulgated regulations implementing the five-year recall statute. Concerns were raised by the Bankruptcy Committee of the Judicial Conference regarding: (1) the potential abuse of the compensation provision by some retired judicial officers whose annuities were less than the full salary of the office; (2) the difficulty in defining "substantial service" as required under the statute; and (3) the potential adverse effect on requests for permanent bankruptcy judgeships. Finally, the Bankruptcy Committee noted that the existing "ad



hoc" recall provision was operating well and the need for the five-year recall was not compelling.

Although the Magistrates Committee of the Judicial Conference was favorably disposed to implementing the five-year recall provision, it deferred to the concerns of the Bankruptcy Committee. The process of crafting "senior status" procedures for magistrates which provide job security and are not inimical to the interests of the bankruptcy system presents a challenge for the future.

## PART VI

### CONCLUSIONS

The magistrates system has operated for slightly more than two decades. Yet within this relatively short span, it has become firmly established as an integral component of the federal judiciary. The members of the Judicial Conference of the United States, who deal directly with magistrates, have been staunch supporters of the system. The effectiveness of the system was also recognized formally by the investigative arm of Congress, the General Accounting Office. The only disappointment with the system has been the missed opportunities by a few courts to realize the "full benefits" of the system.

The improved utilization of magistrates will always be a goal of the system. The challenge is to persuade judges to use magistrates fully and to facilitate their use in those courts for whatever duty authorized under the Magistrates Act.

Informing judges of the many different ways to use magistrates is essential in maintaining the vigor and success of the system. The task is an ongoing enterprise. The flexible nature of the system lends itself to innovative and new uses of magistrates. The potential benefits of the system can be significantly enhanced if the courts are kept advised of new procedures or approaches.

In addition to continuing the educational process, some adjustments in the structure of the system in the form of "fine-tuning" may also help. In particular, prospective changes in the procedures governing consent in civil cases and petty offense procedures, the title of the office, and the use of retired magistrates in a senior status role should be carefully considered. Any fundamental change, however, must safeguard against undermining the institutional "supplementary" role of magistrates. The challenge is to steer a course between facilitating procedures in order to maximize utilization of magistrates and the unintentional creation of a lower-tiered judicial office with separate and distinct responsibilities.

**THE FEDERAL MAGISTRATES SYSTEM**

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Report to the  
Federal Courts Study Committee  
from the  
National Council of United States Magistrates  
on the  
Present State of the Federal Magistrates System  
and the  
Role of Magistrates into the Twenty-First Century

August, 1989

Prepared by:

Virginia M. Morgan  
United States Magistrate  
Eastern District of Michigan

## THE FEDERAL MAGISTRATES' SYSTEM

Report to the Federal Courts Study Committee From  
the National Council of United States Magistrates

### INTRODUCTION

The National Council of United States Magistrates (NCUSM) submits this report for consideration by the Committee in conjunction with the reports on the role of magistrates from the Administrative Office and the Judicial Conference.

The NCUSM is an independent, voluntary organization of both full-time, part-time, and retired United States Magistrates. Well over 70 percent of current magistrates belong. The recommendations set forth in this report were developed by the Long Range Planning Committee of the NCUSM and approved by the membership at the 1989 annual meeting.

In 1968, congressional legislation created the magistrates system. The jurisdiction of magistrates was expanded by Congress in 1979. The new legislation gave magistrates varying degrees of authority in virtually the full gamut of actions handled by federal courts. The selection of magistrates is lodged in the district courts, and is based upon statutory criteria and a competitive selection process. This process over the 20-year period has resulted in a corps of highly experienced and skilled judicial officers who have substantial backgrounds in federal litigation and/or academic expertise.

The present state of the magistrates system varies by district. The system was designed to be a supplementary and flexible resource for the court. Thus, no one way of using magistrates can be said to be the ideal. Nevertheless, a significant minority of districts do not fully use magistrates under the existing statutory framework.

The primary goal underlying the specific recommendations is full utilization of magistrates throughout the various federal districts. As noted in the July, 1983 report of the GAO, the magistrates system is an efficient, integral and important component of the federal judiciary. The report advocated increased use of the magistrates system. The NCUSM also sees underutilization as the most significant drawback of the system as currently implemented. The Council's recommendations are directed to three essential areas, each of which needs to be strengthened if maximum utilization of magistrates is to be obtained. These areas are: respect for the magistrate position, interaction between magistrates and other judges, and limited adjustments to the

system in order to make it more "user friendly" without having an impact on constitutional considerations.

The council believes that implementation of these recommendations will enable both individual judges and also district courts as a whole to more fully draw upon the high caliber professionals available to assist them with managing civil and criminal cases.

#### SUMMARY

At the July, 1989 National Council meeting, the NCUSM approved recommendations to the Federal Courts Study Committee. They are designed to effectuate the legislative intent of the Federal Magistrates Act of 1979, Pub. L. 96-82, 93 Stat. 643-647. Although this act was designed to enlarge the duties of United States Magistrates and to empower them to try both civil and criminal misdemeanor cases with the consent of the parties, many districts have failed to integrate magistrates as part of the court system. In those districts where full utilization of the magistrate system has been undertaken, such a system has proved invaluable to both the court and the litigants.

A summary of the recommendations follows. Each recommendation is discussed in more depth elsewhere in this report.

The National Council affirmed the following recommendations:

- I. The title of Magistrate should be changed to include the word "judge" in the title.
- II. Magistrates should be provided adequate resources.
- III. Magistrates' retirement benefits should include the Rule of 80, and part-time magistrates should have a retirement system which would parallel that of full-time magistrates.
- IV. The board of the Federal Judicial Center should include representation by magistrates. Magistrates should participate in the business of the courts, including full membership in circuit judicial conferences and observer status at circuit council meetings.
- V. Changes should be made in magistrates' criminal jurisdiction.

A. Magistrates should be granted jurisdiction to authorize wiretaps under Title III of the Omnibus Crime Control Act, 18 U.S.C. §2510 et seq.

B. The requirement of consent in petty offense cases should be eliminated, and magistrates should be authorized to take guilty pleas in felony cases without consent.

C. Magistrates should have authority to conduct all or part of felony proceedings, with the consent of the parties, upon an order of reference from the district judge.

VI. Changes should be made in magistrates' civil jurisdiction.

A. The civil consent provisions of 28 U.S.C. §636(c) should be clarified to eliminate the requirement to be "specially designated" and should include a specific provision stating that such jurisdiction becomes effective upon an appropriate reference from a district judge.

B. Magistrates should be granted authority to issue TROs and preliminary injunctions without the consent of the parties, and to enter final orders in all motions (dispositive and non-dispositive), subject to appeal.

C. Magistrates should be granted limited contempt power to control discovery and trial proceedings.

DISCUSSION

I. The title of Magistrate should be changed to include the word "judge" in the title.

The form of address and title "magistrate" is recognized as a confusing title throughout the federal judicial system. The title requires explanation to most litigants and therefore inhibits district court delegation of consent jurisdiction. Misconceptions often occur in districts where state or local officials with limited jurisdiction, and frequently without law degrees, are called "magistrates." Inclusion of the word judge in the title would promote respect for the position.



United States Magistrates appear to be the only federal non-Article III judicial officers not referred to by the title of judge. (E.g., Bankruptcy Judge, formerly referee; Administrative Law Judge, formerly hearing officer; Tax Court Judge; Special Trial Judge of the U. S. Tax Court [a tax court "magistrate"]; Immigration Judge). Since decisions of administrative law judges are frequently reviewed by magistrates, it seems appropriate that the magistrate's title reflect this authority.

The NCUSM recognizes the importance of maintaining a clear distinction in title between Article III judges and magistrates. Unlike bankruptcy judges and administrative law judges where a distinction is easily made based on the kind of cases heard, the magistrates' jurisdiction can be virtually contiguous with that of the district judge (with the exception of felony trials). Thus, a title must reflect either the supplementary nature of the position or manner of selection. The important aspect, as noted by the report of the Magistrate's Committee of the Judicial Council, is to incorporate the word "judge" in the title.

Extensive discussions and surveys by the members of the NCUSM have resulted in a preference for the title "Associate Judge" reflecting the supplementary nature of the magistrate's duties, yet indicating collegiality and respect in a form easily understood by litigants and lawyers, as an associate of a law firm. Other suggestions included adjunct judge, magistrate judge, and term judge.

Part-time magistrates must meet the same statutory criteria for qualifications and are also competitively selected. While the range of duties they perform may be significantly more limited than full-time magistrates, it is recommended that their title also include the word judge.

## **II. Magistrates should be provided adequate resources.**

The Magistrates Division of the U. S. Courts has done an outstanding job with assisting magistrates in securing the necessary staff and equipment to properly handle the needs of the district court. Most magistrates have adequate resources, space, staff, and available books and equipment to enable them to do their job. However, some magistrates are lacking such necessary support including computer support, courtrooms and security. The council recommends that data processing equipment and courtrooms be allocated to magistrates who have substantial civil or criminal dockets to control.

- III. Magistrates' retirement benefits should include the Rule of 80, and part-time magistrates should have a retirement system which would parallel that of full-time magistrates.

The council recommends that with respect to retirement benefits, a "Rule of 80" should be adopted so that magistrates would be eligible for retirement benefits at age 65, when their cumulative years of judicial service plus their age equals 80. This is the same provision currently available to Article III judges. Magistrates should have the benefit of any changes to the Rule which become available to Article III judges. It is further recommended that an appropriate pension and retirement system for part-time magistrates, giving them similar benefits to full-time magistrates, be enacted by Congress. These would serve to continue to attract high caliber individuals respected by the legal community.

- IV. The board of the Federal Judicial Center should include representation by magistrates. Magistrates should participate in the business of the courts, including full membership in circuit judicial conferences, and observer status at circuit council meetings.

By statute (28 U.S.C. §621), membership of the Board of the Federal Judicial Center includes "one active bankruptcy judge," as well as Article III judges, but makes no provision for any magistrate to hold a position on the Board. Magistrates have had an active, participatory role with the Center in terms of regional seminars, publications, and contributions to the media library.

It has been the expressed policy of the Judicial Conference of the United States to promote parity between magistrates and bankruptcy judges. The inclusion of an active magistrate on the board of the Center would help provide such parity, as well as fulfill the stated duties of the board. See, 28 U.S.C. §623.

In a related matter, judicial conferences are held periodically pursuant to 28 U.S.C §333. They require the attendance of bankruptcy judges as well as circuit and district judges. Magistrates are not statutorily included. Different circuits handle this in various ways, e.g., treating magistrates as invitees or guests. The full participation of magistrates would serve to further improve the administration of justice within the circuit, the stated purpose of the conference. Since magistrates deal with many litigants and lawyers of both the civil and criminal bar, and are often the first contact plaintiffs and

defendants have with the court, their input into the "business of the courts" should be provided for by statute.

Amendment of the statute to include magistrates as members would promote parity with bankruptcy judges, as well as promote interaction with other judges. Such interaction is an essential part of building collegiality.

**V. Changes should be made in magistrates' criminal jurisdiction.**

**A. Magistrates should be granted jurisdiction to authorize wiretaps under Title III of the Omnibus Crime Control Act, 18 U.S.C. §2510 et seq.**

The statutes permitting wire interception and interception of oral communications were enacted in 1968, well before the 1979 act expanding magistrates' jurisdiction. Magistrates routinely handle virtually all other preindictment criminal matters, including search warrants, arrest warrants, and complaints, and electronic surveillance in the form of "beeper warrants" and pen registers. The relevant definitional section of the statute defines a "judge of competent jurisdiction" who may authorize a Title III wiretap as a federal district judge, federal circuit judge, and also a "judge of any court of general criminal jurisdiction of a state who is authorized by a statute of a state to enter orders authorizing interceptions of wire or oral communications." 28 U.S.C. §2510(q). The statute did not restrict authorization only to Article III judges and magistrates should be added to the list.

Wiretap affidavits are frequently not ready until after normal business hours. Portions of affidavits may be needed to be disclosed in order to support a showing of probable cause for a complaint or search warrant. Time is frequently of the essence in these circumstances. Thus, a magistrate's authority over the issuance of a wire interception would be of significant value to the court and would not adversely impact concerns of due process.

**B. The requirement of consent in petty offense cases should be eliminated, and magistrates should be authorized to take guilty pleas in felony cases without consent.**

The NCUSM supports the recommendation and analysis of the Magistrates' Committee of the Judicial Conference to eliminate the consent requirement for petty offense cases. The discussion of this area in that report does not need to be repeated here.

In some jurisdictions, defendants who wish to plead guilty to felony charges may have to wait significant periods of time before a district judge is available or comes to that location to hold court. If the judge was able to refer the matter to a magistrate, considerable time and money could be saved with no sacrifice of due process as review would be available by the judge at or before the time of sentencing.

- C. Magistrates should have the authority to conduct all or part of felony proceedings, with the consent of the parties, upon an order of reference from the district judge.

Currently, parties may consent to trial before the magistrate in civil cases pursuant to 28 U.S.C. §636(c). It is recommended that such an option be made available for felony cases as well.

The enactment of the sentencing guidelines provides a strong rationale for taking consent felony proceedings before magistrates upon reference by the judge. Where the guidelines direct the sentence and no reason to depart is suggested (e.g., social security overpayments cases, bank embezzlement, escape from a halfway house), a magistrate could substantially assist the court in conducting the trial of all or a part of the case. An explicit statutory authorization for felony jury selection in light of Gomez v. United States, \_\_\_ U.S. \_\_\_, 57 U.S.L.W. 4634 (6/12/89), would make clear each party's rights and the procedure to be used.

#### VI. Changes should be made in magistrates' civil jurisdiction.

- A. The civil consent provision of 28 U.S.C. §636(c) should be clarified to eliminate the specific requirement to be "specially designated," and should include a specific provision stating that such jurisdiction becomes effective upon an appropriate order of reference from a district judge.

At the time the initial provision for special designation was included in the statute, not all active magistrates met the new statutory criteria or had been selected pursuant to the merit selection procedures. Since that time, more than 10 years have passed. All currently active magistrates have either been appointed or reappointed under those criteria. A very small minority of districts (approximately three) have not designated magistrates to exercise §636(c) jurisdiction. Consequently, only



minimal utilization of magistrates can be made in those districts, even by district judges who would like to refer certain cases for trial or for orders on dispositive motions. No rational basis exists to continue the requirement. Some judges have not voted for designation or do not allow consent jurisdiction because they are of the opinion that if the parties consent to trial before the magistrate, the district judge "loses jurisdiction," and thus loses control of the case. A clarification in the statute that §636(c) jurisdiction becomes effective upon an appropriate order of reference would help bring about increased utilization of the skills of the high-caliber professionals now in place.

- B. Magistrates should be granted authority to issue TROs and preliminary injunctions without the consent of the parties, and to enter final orders in all motions (dispositive and non-dispositive) subject to appeal.

Section 636(b)(1)(A) exempts motions for injunctive relief from those matters which may be referred to the magistrate for "hearing and determination." A magistrates' jurisdiction is thus limited to a report and recommendation which must be served on all parties and to which all parties have 10 days to object, requiring the court to make a de novo review of those portions. This procedure essentially defeats any effective utilization of magistrates in the area of injunctive relief. If a judge could refer the matter to a magistrate for an order, the party would be able to receive immediate review and have the right to review by the judge after service of the order.

Primary use of magistrates in this area would be expected in post-judgment motions for a judgment creditor's examination and preliminary restraining orders, and prisoner motions for TROs and injunctive relief. These could be referred by the judge for a hearing and determination and could be done as an order appealable to the district judge. Although the parties would still have the opportunity to appeal, the order granting or denying injunctive relief would be in place.

Similarly in other motions, orders could be entered with an appeal route available as set forth in F.R.C.P. Rule 73, upon an appropriate order of reference. The judge should have the option of referring the matter for final order subject to appeal or for report and recommendation. This flexibility would allow more effective case management and still provide the judge with docket control. Once an exception or objection is filed to the order, review would be on a clearly erroneous basis, enhancing the flow of civil cases.



- C. Magistrates should be granted limited contempt power to control discovery and trial proceedings.

This recommendation is the same as that made by the Magistrate's Committee of the Judicial Council. Such limited power would only go to punish misbehavior committed in the magistrate's presence subject to any constitutional limitations. Misconduct committed outside the presence of the magistrate would be punished in accordance with the procedures set forth under the bankruptcy rules. (See, B.R. 9020)

### CONCLUSION

The role of the magistrate in the twenty-first century is one which can offer great benefits to the district courts. Effective case management can be developed which utilizes the resources of highly-experienced, well-qualified, cost-effective judicial officers. The adjustments to the structure of the system as recommended in this report provide for limited changes in the current system, and are designed to give district judges additional and/or clearer options for using the magistrate system.

It is essential to recognize that, with the exception of some preliminary criminal matters, the work of the magistrate comes solely from the district judge. The judge always retains discretion to decide which, if any, matters to refer. Thus, the district court itself determines how fully magistrates will be utilized.

As noted in the report of the Administrative Office, restrictive use of magistrates minimizes utilization and undermines the character of the position. It tends to bring about a specialist position (e.g., in social security cases or prisoner work) contrary to the generalist concept underlying the creation of the magistrate's position as a supplementary judicial officer.

The statutory criteria and competitive selection process ensure that magistrates will continue to be experienced, highly skilled professionals. In order to retain such individuals, adequate resources, a respected position, collegiality and a broad range of duties must be provided. The selection of magistrates by the district judges themselves should give the court considerable confidence in the ability of such chosen judicial officers to handle whatever work the judge may refer.

Increased participation by magistrates in educational programs and on court committees, as recommended in this report, should increase personal interaction between magistrates and Article III judges. As noted in the report of the Administrative Office, where a strong collegial environment exists between judges

and magistrates, the range of duties performed by magistrates and the full utilization of the skills of these individuals is generally enhanced.

The limited structural changes, as proposed here, will make the system easier to use and will increase the lawyers', parties', and district judges' level of comfort with the system. Education and training in effective use of the system will maximize the utilization of magistrates. The full potential of the magistrate system as a flexible resource can only be achieved by continued use in as broad a range as possible.

However, regardless of how finely tuned the structure of the system may be, ongoing, collegial, working relationships between judges and magistrates are required for full utilization of the system. Such collegiality will prevent unintentional creation of a separate, lower-tiered group of judicial officers with separate and unrelated responsibilities.

Development of a well-structured magistrates' system, which utilized to its full potential in a collegial atmosphere, is the challenge that we must meet in the twenty-first century.

UNITED STATES DISTRICT COURT  
Northern District of Texas  
United States Courthouse 1205 Texas Avenue  
Lubbock, Texas 79401

J.Q. WARNICK, JR.  
U.S. Magistrate

February 23, 1989

Hon. Joseph F. Weis, Jr.  
Chairman  
Federal Courts Study Committee  
22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, PA 19106-1722

Dear Judge Weis:

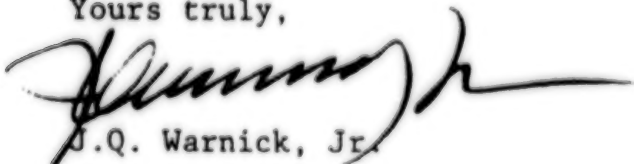
In your letter of February 15th you touched on the creation, selection and utilization of Non-Article III Judges such as Magistrates.

A Bankruptcy Judge is appointed for a 14 year term and a U.S. Magistrate is appointed for an 8 year term. Under the new Retirement Act for Magistrates and Bankruptcy Judges retirement matures for both at fourteen (14) years.

Some consideration should be given to changing the appointment period of U.S. Magistrates from eight (8) years to fourteen (14) years. For those Magistrates who will have fourteen (14) years of service and have reached their 65th birthday, they probably will take retirement at age 65. Therefore, the eight (8) plus eight (8) = sixteen (16) year appointment becomes superfluous at least for the last two (2) years of the appointment.

It also seems inequitable that Bankruptcy Judges with to only one (1) appointment will earn a retirement, however, Magistrates require two (2) appointments to get a retirement.

Yours truly,



J.Q. Warnick, Jr.

JQW, Jr./ar

cc: Hon. J.P. Godich  
Pres., U.S. Council of Magistrates

United States District Court  
for the District of Columbia  
Washington, D.C. 20001

Chambers of  
Patrick J. Altridge  
United States Magistrate

February 24, 1989

The Honorable Joseph F. Weis, Jr.  
Federal Courts Study Committee  
22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, PA 19106-1722

Dear Judge Weis:

I welcome your invitation to bring to the attention of the Federal Courts Study Committee my thoughts regarding the future of the judiciary as well as ways and means to make it more accessible and efficient.

I would suggest that greater utilization be made of present resources. In that regard, I believe legislation should be sought to enable magistrates to hear and enter final judgments in all federally created causes of action such as federal tort claims, freedom of information cases, etc., as well as diversity cases, without the necessity of obtaining consent from the parties, with de novo appeals to a district judge. The current system of written reports and recommendations encourages the losing party to appeal and in effect reduces the magistrates work to that of a super law clerk or advisor.

I believe a more dispositive approach would act as a screening process which would hopefully aid in diminishing the caseload of district judges. I do not believe such a procedure would have any Marathon Oil or constitutional impediments so long as the parties have a right to a de novo trial before an Article III judge. A statutory procedure similar to the compulsory arbitration proceedings employed by many states in medical malpractice cases, notably Maryland and Missouri, could be employed. However, instead of an arbitration panel, the parties would be required to proceed initially before a magistrate and, in appropriate cases, a jury. I believe there would be few appeals, provided, the parties feel they have received a fair and impartial trial.

I would also suggest the consideration of legislation authorizing the use of magistrates on the circuit courts to resolve contested nonmerits motions. This would enable the present motions panels to devote their time to consideration and disposition of cases on the merits.

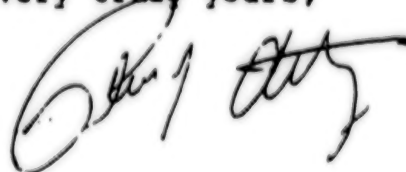
February 23, 1989

In so far as the administrative aspects of the federal courts are concerned, I would urge the panel to encourage the circuit and district courts to follow the lead of the Chief Justice, who has appointed magistrates and bankruptcy judges to Judicial Conference committees, by appointing these judicial officers as ex officio nonvoting members of the Board of Judges of the local courts and by appointing them to local court committees. For the most part, magistrates and bankruptcy judges have had considerable experience in private practice or government service prior to their appointments. Their knowledge and practical experience are substantial resources that should not be bypassed or overlooked.

In this day and age of bugetary constrains, I believe that the expanded use of magistrates and bankruptcy judges on both the administrative and substantive level will help provide the public with the fair, impartial, efficient resolution of litigation it had become accustom to in the past.

Thank you and the members of your committee for the opportunity to provide this input and share these thoughts with you.

Very truly yours,

A handwritten signature in dark ink, appearing to be "J. Weis", written in a cursive style.

PJA/slb



EDWIN E. NAYTHONS  
UNITED STATES MAGISTRATE  
U.S. COURTHOUSE  
INDEPENDENCE MALL WEST  
PHILADELPHIA, PENNSYLVANIA 19106

February 21, 1989

Federal Courts Study Committee  
22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, PA 19106-1722

Attention: Honorable Joseph F. Weis, Jr.  
Chairman

Dear Judge Weis:

Pursuant to your letter of February 15, 1989, seeking the input from the Federal Bench I trust you will consider my views with respect to the creation of a separate court to review appeals from the decisions of Administrative Law Judges on Social Security Disability decisions.

For the past seventeen years, I have, in addition to my other commitments and duties, written reports and recommendations for the District Court Judges on approximately 1,000 occasions. Needless to say, these cases have taken much of my valuable time because each case requires a complete reading of the transcript before the Administrative Law Judge, the decision of the Appeals Council, the motions for summary judgment and the responses thereto as well as the voluminous briefs submitted by counsel.

I cannot believe that it was the intention of Congress when it created the position of the United States Magistrate that we should become "experts" in the field of Social Security Disability matters which requires us to put greater time into these cases than all of our other duties combined. For many years I have heard of Bills being introduced into Congress regarding the creation of a separate court for hearing these cases, and I am certain that the time has now arrived for this Court to be created.

As you well know we now have a full range of duties including the trial of non-jury and jury matters with the

February 21, 1989

consent of the parties as well as disposing of discovery motions, summary judgment motions, habeas corpus petitions, our daily criminal list cases involving arrests, searches and seizures, pre-trial detention hearings, etc. Our best efforts should be directed to disposing of the above matters, not just reading and interpreting medical reports.

I want to thank you for taking the time to consider our needs and trust that the Committee's response will be received in due course.

Respectfully,

A handwritten signature in dark ink, appearing to read "Edwin E. Naythons", written in a cursive style.

EDWIN E. NAYTHONS  
UNITED STATES MAGISTRATE

EEN:eck

# Defender Services

## Issues

**SUMMARY OF DEFENDER SERVICES ISSUES  
UNDER THE CRIMINAL JUSTICE ACT, 18 U.S.C. § 3006A**

**Submitted by**

**Theodore J. Lidz, Chief  
Defender Services Division  
Administrative Office of the U.S. Courts**

**Summary**

The Congress enacted the "Criminal Justice Act of 1964" (CJA), 18 U.S.C. § 3006A, to authorize payments to appointed counsel and thus better ensure effective representation for financially qualified defendants in federal criminal proceedings. The CJA was amended in 1970 to provide for the establishment of federal public and community defender organizations. The legislative history indicates that the Congress was concerned that the independence of counsel might be compromised by placing the administration of the program under the supervision of the federal government. It provided that the Judiciary, as a neutral body, would assume this responsibility until the time was "ripe" to establish a "strong, independent office to administer the Federal defender program," and that the Congress would conduct an on-going review of the "need [of the defender program] for a strong independent administrative leadership." To date, no comprehensive follow-up study has been undertaken. Certain persistent problems bearing on the independence of the federal defender and appointed counsel program have been identified but remain unsolved.

These problem areas include: (1) the impact of judicial involvement on the selection and compensation of the federal public defenders and on the independence of federal defender organizations; (2) equal employment and affirmative action inadequacies; (3) judicial involvement in appointment and compensation of panel attorneys and experts; (4) inadequacy of compensation for legal services provided under the CJA; (5) quality of CJA representation; (6) lack of adequate administrative support for the defender services program; (7) attorney compensation maximums with regard to appeals of habeas corpus proceedings; (8) contempt, sanctions and malpractice representation of panel attorneys; (9) appointment of counsel in multi-defendant cases; (10) early appointment of counsel in general and prior to the pretrial services interview in particular; (11) fact witness fees; and (12) non-custodial transportation of defendants.

### **Recommendations**

The Federal Courts Study Committee should undertake the initiation of a comprehensive review of the CJA, its implementation and administration. The purpose of the review would be to assess the current effectiveness of the CJA and to recommend appropriate legislative policy, procedural and operational changes.

### **Comments**

This paper clearly outlines the problem areas that have developed since the enactment and implementation of the CJA. It sets forth the specific policy concerns and areas of study, listed above as items 1 through 12, that the Defender Services Division believes should be included in a comprehensive review of the CJA. This paper provides the information necessary for the subcommittee to consider the need for a thorough evaluation of the CJA. It is suggested that the subcommittee recommend that the Judicial Conference Committee on Defender Services undertake such an evaluation.



**SUMMARY OF DEFENDER SERVICES ISSUES  
UNDER THE CRIMINAL JUSTICE ACT, 18 U.S.C. § 3006A**

**PREPARED AT THE INVITATION OF  
THE SUBCOMMITTEE ON COURT STRUCTURE  
OF THE  
FEDERAL COURTS STUDY COMMITTEE**

**By**

**Theodore J. Lidz, Chief**

**With the assistance of**

**M. Patricia Walther, Staff Attorney**

**Defender Services Division  
Administrative Office of The U.S. Courts**

SUMMARY OF  
DEFENDER SERVICES ISSUES

The Congress enacted the "Criminal Justice Act of 1964" (CJA), 18 U.S.C. §3006A, to authorize payments to appointed counsel and thus better ensure effective representation for financially qualified defendants in federal criminal proceedings. The CJA was amended in 1970 to provide for the establishment of federal public and community defender organizations as additional options for furnishing criminal defense services. The legislative history indicates that the Congress was concerned that the independence of counsel might be compromised by placing the administration of the program under the supervision of the federal government. It provided that the Judiciary, as a neutral body, would assume this responsibility until the time was "ripe" to establish a "strong, independent office to administer the Federal defender program," and that the Congress would conduct an on-going review of the "need [of the defender program] for a strong independent administrative leadership." Senate Report No. 91-790, 91st Cong., 2d Sess., April 23, 1970, at 18.

Although the CJA has been in effect for 24 years and has been amended several times, and the federal defender program has been operating and expanding for 18 years, no comprehensive follow-up study of the sort envisioned by the Congress has ever been undertaken. Over the course of nearly a quarter of a century, certain persistent problems bearing on the independence of the federal defender and appointed counsel program have been identified but remain unresolved. Enclosed is a preliminary analysis of some of these issues, as well as a summary of background information on the defender program.

In view of the critical importance of the CJA to the viability of the Sixth Amendment right to effective assistance of counsel, it is recommended that the Federal Courts Study Committee undertake the initiation of a comprehensive review of the CJA, its implementation and administration. The purpose of the review would be to assess the current effectiveness of the CJA and to recommend appropriate legislative policy, procedural and operational changes.

## DEFENDER SERVICES ISSUES

### Background

#### A. History

The Congress enacted the "Criminal Justice Act of 1964," 18 U.S.C. §3006A (hereinafter "CJA"), in order to provide a system for payment of the cost of providing defense services to financially eligible federal criminal defendants.<sup>1</sup> Previously, the private bar had provided representation for financially eligible defendants without compensation or payment of expenses.

While it specified that both private counsel and organizations, such as bar associations or legal aid agencies, could be compensated for furnishing defense services, the CJA as originally enacted did not provide for a system of federally financed defender organizations. The Congress had considered such an option, but ultimately did not include it in the CJA in response to expressions of concern over governmental control of the defense function. However, the Congress did request that the Department of Justice "review its most recent study on the need for a Federal public defender system," and "conduct a study and analysis in order to reexamine and reevaluate the need for such a system." Conference Report No. 1709, 88th Cong., 2d Sess. (1964).

Subsequently, the Department of Justice and the Judicial Conference of the United States jointly commissioned Professor Dallin H. Oaks of the University of Chicago to conduct a study of the administration and operation of the CJA and the need for a federal public defender system. In his report, entitled "The Criminal Justice Act in the Federal District Courts," Professor Oaks concluded that the

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<sup>1</sup> Under the CJA, the Judicial Conference of the United States has administrative responsibility for the programs funded under the CJA and, for this reason, the Judicial Conference has established a standing committee, the Judicial Conference Committee on Defender Services (formerly the Committee to Implement the Criminal Justice Act). Pursuant to subsection (h) of the CJA, the Judicial Conference is authorized to issue guidelines governing the provision of defense services under the CJA. The Defender Services Division of the Administrative Office of the United States Courts assists the Defender Services Committee in administering the defender services program, which is funded through a separate appropriation from the Congress.

disadvantages associated with a federal defender system, including governmental control and the lack of independent advocacy, would be minimized or eliminated by creating a "mixed system", which would apportion the CJA appointments between federal defender organizations and members of the private bar. Professor Oaks also concluded that private defenders or independent grantee agencies, i.e., community defender organizations, would be preferable to federal public defenders, based on the greater independence of those organizations.

In 1970, responding to Professor Oaks' findings, the Congress amended the CJA to provide, among other things, authority to establish federal public and community defender organizations.<sup>2</sup> The legislative history of these amendments indicates that the Congress intended to conduct an on-going review of "the need for a strong independent administrative leadership" of the defender services program "until the time is ripe" to establish a "strong independent office to administer the Federal defender program," such as an independent "Defender General of the United States" or a special directorate for defender programs within the Administrative Office of the United States Courts.<sup>3</sup>

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<sup>2</sup> The 1970 Amendments to the CJA, Pub. L. 91-447, 84 Stat. 916 (1970), added a provision (now subsection (g)), which authorized establishment of federal public and community defender organizations in districts (or aggregates of districts) with 200 or more appointments of counsel annually. Community defender organizations are private organizations governed by separate boards of directors and funded through CJA grants. In contrast, the federal public defender is appointed by the court of appeals for the circuit in which the district is located. The defender and the defender's staff are federal employees. The 1970 amendments also mandated that private attorneys be appointed "in a substantial proportion of cases," presumably in order to maintain the "mixed system" in every district served by a defender organization. Senate Report No. 91-790, 91st Cong., 2d Sess., April 23, 1970, at 5.

<sup>3</sup> In its discussion of the Federal defender system, the Senate Report on the 1970 amendments to the CJA stated:

The committee recognizes the desirability of eventual creation of a strong, independent office to administer the Federal defender program. It considered as a possibility the immediate establishment of a new, independent official--a "Defender General of the United States." It also considered establishing a special directorate for defender programs within the Administrative Office of the U.S. Courts.

The committee, however, does not recommend founding an independent official

### B. Current Status

The first six federal defender organizations were established in 1971. Presently, there are 35 federal public defender organizations, 6 "traditional" community defender organizations, and 13 death penalty resource center/community defender organizations<sup>4</sup>. These organizations collectively furnish legal services in 63 of the 94 judicial districts.

### Suggested Study Areas

Various policy concerns with regard to the defender services program have arisen over the years. These concerns include the following:

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at this initial stage. Such a step would be premature until Congress has had an opportunity to review the operations of the defender program over the course of a few years. Nor does it recommend placing the overall direction of these programs in the Administrative Office. Clearly, the defense function must always be adversary in nature as well as high in quality. It would be just as inappropriate to place direction of the defender system in the judicial arm of the U.S. Government as it would be in the prosecutorial arm. Consequently, the committee recommends that the need for a strong independent administrative leadership be the subject of continuing congressional review until the time is ripe to take this final step. (Emphasis added.) Senate Report No. 91-790, supra note 2, at 18.

<sup>4</sup> Death penalty resource centers are designated as community defender organizations pursuant to subsection (g)(2)(B) of the CJA. Resource centers serve a specialized defense function. They monitor the status of death penalty cases pending in the states they serve, recruit attorneys to represent death-sentenced federal habeas petitioners, provide assistance and expert advice to counsel appointed in death penalty cases, and serve as counsel of record in a limited number of cases. Resource centers assist in providing death penalty representation in both federal and state courts and are funded jointly from federal and non-federal sources.



**o The impact of judicial involvement on the selection and compensation of the federal public defenders and on the independence of federal defender organizations**

**1. Appointment, reappointment and compensation of federal public defenders**

The vesting in the court of appeals of the authority over the appointment, reappointment and compensation of federal public defenders<sup>5</sup> was intended to ensure against the involvement of the district court (before which the defender principally practices) in the affairs of that office and the chilling effect which such influence might produce. Most circuit courts, however, appear to defer to a great extent to the district courts with respect to appointment and reappointment of the federal public defender. Even circuits which employ screening panels to assist in the federal public defender selection and reappointment process generally include district judicial officers on those panels.

The CJA provides that the court of appeals will fix the compensation of federal public defenders at a rate which does not exceed that of the U.S. attorney in the district. The federal public defender in turn fixes the compensation of attorneys and other personnel in that organization at rates not exceeding those with similar qualifications and experience in the U.S. attorneys office. The U.S. attorneys receive substantial support, assistance and guidance from the Department of Justice and its specialized legal branches, as well as its own and other executive branch enforcement and administrative agencies. Comparable support is not available to the federal public defender who must, as a result, be resourceful, skilled and self-sufficient.

In view of the independence of the federal public defender offices, the lack

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<sup>5</sup> Subsection(g)(2)(A) of the CJA requires that the federal public defender be appointed by the court of appeals of the circuit. It also states that

The Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the court of appeals of the circuit for incompetency, misconduct in office or neglect of duty. Upon expiration of his term, a Federal Public Defender may, by a majority vote of the judges of the court of appeals, continue to perform the duties of his office until his successor is appointed, or until one year after the expiration of such Defender's term, whichever is earlier. The compensation of the Federal Public Defender shall be fixed by the court of appeals of the circuit. . ."

of line supervision and support and the complex life and liberty issues at stake, federal public defenders' salaries should be equal to the compensation paid to U.S. attorneys. The impact of limitations on the federal public defender's salary upon the compensation of senior assistant federal public defenders provides additional strong justification for salary comparability between federal public defenders and U.S. attorneys. Payments of less than parity result in restrictions of the salaries of the most experienced assistant federal public defenders in relation to their assistant U.S. attorney counterparts. This situation is clearly inconsistent with the CJA and the intent of Congress. Within the past two years the 9th and 10th Circuits have adopted a policy of parity and the 3rd Circuit now provides for salary comparability after the incumbent federal public defender has completed two four year terms in office. The other circuit policies range from ad hoc to a specific dollar amount less than the salary of the U.S. attorney and some provide, as an alternative, a salary for the federal public defender which is the higher of 95% of the salary of the U.S. attorney or equal to the compensation of the highest paid assistant U.S. attorney. Finally, at least one circuit with an ad hoc approach to federal public defender compensation has sought and apparently deferred to the recommendations of the district court on the matter of a federal public defender's compensation.

## **2. Establishment and disestablishment of federal defender organizations**

While the Congress placed final authority to create or disestablish a defender organization in the circuit court<sup>6</sup>, the preference of the district court with respect to the establishment or disestablishment of federal defender organizations has been virtually determinative of whether an organization will exist. As a result, district courts maintain a degree of control over federal defender organizations that the Congress sought to avoid.

## **3. The federal public defender vs. the community defender option**

The federal courts to be served determine the type of organization to be established in a district. Professor Oaks believed that the community defender organizational model offered greater independence than that of a federal

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<sup>6</sup> Subsection (g)(1) of the CJA provides that a "district or a part of a district [or adjacent districts] in which at least two hundred persons annually require the appointment of counsel may establish a defender organization. . . ." However, any district court decision to establish a defender organization must be approved by the judicial council of the circuit. 18 U.S.C. §3006A (a).

public defender. This assumption should be evaluated in the light of past experiences and current values.

**o Equal employment and affirmative action inadequacies**

Among the ranks of the 35 federal public defenders (who are appointed by the courts of appeals), there are no blacks, only one Hispanic and one woman. With regard to the community defender organizations, which are governed by independent boards, three of the six traditional organizations are directed by women and four of the 13 death penalty resource center/community defender organizations have female directors. None are directed by blacks or Hispanics.

**o Judicial involvement in appointment and compensation of panel attorneys and experts**

Under the CJA, the court is responsible for appointing and compensating counsel and experts providing services for financially eligible defendants.<sup>7</sup> A court need not afford any procedural protection before denying or reducing a claim for compensation<sup>8</sup>, and there is no mechanism for appointed counsel to appeal a court's

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<sup>7</sup> Subsection (a)(1) of the CJA provides for the mandatory appointment of counsel by the court in certain cases. Subsection (a)(2) indicates those circumstances in which the appointment of counsel is at the court's discretion. Subsection (d) sets forth the provisions governing the determination of compensation by the court. Under subsection (e), the court has the authority over payment for investigative, expert and other services.

<sup>8</sup> Paragraph 2.22(D) of the Guidelines for the Administration of the Criminal Justice Act, Volume VII, Guide to Judiciary Policies and Procedures, only provides that, in cases where reviewing judicial officers approve less than the amount claimed by appointed counsel, judicial officers may wish to notify counsel of the reduction and provide an explanation.

compensation determination<sup>9</sup>. Attorneys providing CJA services are disturbed by what they have perceived as arbitrary reductions and limitations of compensation awards by the court, and the absence of a proceeding for challenging or appealing awards of less than amounts claimed. Judicial involvement in the appointment and compensation of counsel may also adversely impact upon the independence and zealously of those providing CJA services.

**o Inadequacy of compensation for legal services provided under the CJA**

The federal government fully funds prosecutorial efforts. However, limitations on compensation authorized under the CJA reflect a substantial reliance on the obligation of lawyers to provide pro bono services. Federal criminal defense practice has become a complex specialty. The reliance on a pro bono contribution by private counsel results in either an unfair burden on the criminal defense bar or the risk that those without financial resources will be less than adequately represented.<sup>10</sup>

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<sup>9</sup> Subsection (d)(3) of the CJA provides only that the chief judge of the circuit (or the chief judge's delegate) must review payments to counsel certified by the court in excess of the maximum amount authorized under subsection (d)(2). While the amount of excess payment may be decreased, there is no authority for the chief judge to increase the amount certified by the court. See, e.g., In re Gross, 704 F.2d 670 (2d Cir. 1983); U.S. v. D'Andrea, 612 F.2d 1386 (7th Cir. 1980); In re Baker, 693 F.2d 925 (9th Cir. 1982); U.S. v. Rodriguez, 833 F.2d 1536 (11th Cir. 1987); U.S. v. Lynch, 690 F.2d 213 (D.C. 1982).

<sup>10</sup> The Supreme Court of Kansas concurred with this view in Stephan v. Smith, 242 Kan. 336, 747 P. 2d 816 (1987):

New developments in the area of criminal law occur frequently, and one must keep up with these changes to be competent to practice in this area. Simply because one has a license to practice law does not make one competent to practice in every area of the law.

As the number, complexity and duration of prosecutions has risen, the demands on the limited pool of experienced criminal defense attorneys has also increased. As the Supreme Court of Kansas in Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987), observed, appointed counsel also face an inherent conflict between remaining financially solvent and the defendant's need for vigorous advocacy<sup>11</sup>, because appointed counsel are generally compensated at rates well below the market rate for legal services, or even the overhead expenses of the attorney. Therefore, additional time expended by the appointed counsel increases the personal costs to the attorney.<sup>12</sup> Consequently, pro bono appointment threatens the fairness of the system and the quality of representation provided to the poor. The focus of the CJA should be on the defendant's right to effective assistance of counsel and not the attorney's right to reasonable compensation. The financial burden of providing representation for financially eligible defendants should be borne by the government, which has this responsibility, and not private practitioners or a small and specialized group thereof.<sup>13</sup>

#### o Quality of CJA representation

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<sup>11</sup> DR 5-101(A) of the Code of Professional Responsibility, cited by the Stephan court, provides that:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

See also ABA Model Rules of Professional Conduct Rule 1.16(a)(5) (1983) ("a lawyer shall not represent a client . . . if . . . the representation will result in an unreasonable financial burden on the lawyer . . .").

<sup>12</sup> There is an additional argument that requiring attorneys to spend an unreasonable amount of time on criminal appointment, which substantially interferes with their private practice, is in violation of the Fifth Amendment's proscription of taking property without just compensation.

<sup>13</sup> See e.g., White v. Pinellas Cty. Bd. of Commissioners, slip op. No. 72,170 (Fla. Sup. Ct. January 26, 1989).



In the 24 years since the passage of the CJA, the number of appointments has grown from approximately 16,000 to 65,000. These appointments are now equally divided between federal defenders and panel attorneys. Federal defenders assume approximately 75% of the caseload in their districts. Panel attorneys are appointed in the remaining 25% and in all cases in the 47 (50%) of the 94 districts in which there is no defender organization or only a death penalty resource center, which serves a very limited defense function. Despite the dramatic growth in the number of appointments, there are no uniform minimum qualification standards for service on CJA panels and virtually nothing has been done to assess the over-all quality of representation provided by either the federal defenders or the panel attorneys.

**o Lack of adequate administrative support for the defender services program**

The Judicial Conference Committee on Defender Services, defender organizations, private attorneys providing CJA services, as well as individual courts and judges, receive administrative assistance from the Defender Services Division of the Administrative Office of the U.S. Courts. The ability of the Defender Services Division to satisfy the increased and accelerating demands for its services has been severely compromised in recent years as the growth in the federal defender program has outstripped the resources made available to the Administrative Office of the U.S. Courts.<sup>14</sup>

**o Attorney compensation maximums with regard to appeals of habeas corpus proceedings**

Appointed counsel providing representation in a proceeding brought under section 2241, 2254 or 2255 of title 28, U.S.C., may in accordance with subsection (d)(2) of the CJA receive a maximum of \$750 "in each proceeding," unless the limit is waived by the chief judge of the circuit or the chief judge's delegate pursuant to subsection (d)(3) of the CJA. Since habeas corpus proceedings, particularly those involving evidentiary hearings, are usually quite complex, the \$750 limitation needs to be substantially increased. Similarly, the language of subsection (d)(2) has been interpreted to mean that the \$750 maximum applies separately both to the district court and the court of appeals stages of the habeas corpus proceeding. Thus,

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<sup>14</sup> In 1988, fourteen new federal defender organizations were established -- one federal public defender organization and thirteen death penalty resource centers -- to bring the total to 54 organizations. As a new type of community defender organization, death penalty resource centers require significant administrative support in developing and implementing appropriate oversight policies and procedures and in the initial process of establishment. See supra note 4 for discussion of death penalty resource centers.

although a habeas appeal is, at a minimum, comparable to an appeal from a trial court disposition and often is more complex, felonies and misdemeanors are subject to a \$2,500 excess compensation limitation (more than three times the limitation associated with habeas appeals). A substantial increase in the habeas appeal limitation is therefore also warranted.

**o Contempt, sanctions and malpractice representation of panel attorneys**

Employees of federal public or community defender organizations are provided representation in contempt and malpractice proceedings and are protected in the event of a malpractice judgment.<sup>15</sup> In contrast, there is no statutory provision for payment of malpractice representation or insurance premiums or deductibles on behalf of private panel attorneys appointed under the CJA. Similarly, reimbursement for representation in contempt proceedings against panel attorneys has not been authorized under the CJA.

**o Appointment of counsel in multi-defendant cases**

Because of the potential for conflict of interest, federal public defenders generally represent only one defendant in a multi-defendant case. The CJA authorizes the appointment of only "one Federal Public Defender within a single judicial district." 18 U.S.C. §3006A(g)(2)(A). Thus, the federal public defender system is unable to provide legal assistance to more than one defendant in a multi-defendant case. Panel attorneys are appointed to represent the remaining defendants. This results in a higher cost, since representation provided by panel attorneys is generally more expensive than representation furnished by federal defenders. In addition, the difficulty of locating competent private attorneys willing to accept CJA appointments is exacerbated in multi-defendant cases, which are more complex and time-consuming than most single-defendant cases. In response to these problems, it has been suggested that authority be obtained to establish several small federal defender offices operating independently of one another within the same district. Under such a system, each office could represent one of the co-defendants in a multi-defendant case, thus reducing the required number of assignments to panel attorneys. This proposal warrants appropriate study and an analysis of how states may be coping with similar problems.

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<sup>15</sup> Subsection (g)(3) of the CJA provides that the Director of the Administrative Office of the U.S. Courts shall hold harmless or provide liability insurance for employees of federal public and community defender organizations for damages "... arising from malpractice or negligence of any such officer or employee in furnishing representational services ... while acting within the scope of that person's office or employment."

**o Early appointment of counsel in general and prior to the pretrial services interview in particular**

Defense counsel may play a critical role in protecting a defendant's constitutional rights in early proceedings. Subsection (c) of the CJA authorizes representation for eligible persons at "every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings." In practice, however, the point in the proceedings at which counsel is assigned varies among districts. In some districts, counsel may not be appointed until the defendant has been detained for several days.

Such delays may have serious implications for a defendant. For example, depending on the district, defense counsel may or may not be appointed prior to the pretrial services interview. Information furnished by a defendant during a pretrial services interview will be disclosed to the U.S. attorney and, in the event the defendant is convicted or pleads guilty, to the probation officer for use in preparing the presentence report. The Sentencing Reform Act of 1984, Pub. L. 98-473, Title II, §211, 98 Stat. 1987 (1984), has caused the federal judiciary to focus on the potential adverse impact that this information could have on a defendant at sentencing. The Judicial Conference has recognized the importance of the advice of counsel during a pretrial services interview.<sup>16</sup> However, conflicts and problems with respect to the appropriate protection of defendant's rights and the requirement of pretrial services and the sentencing statutes remain unresolved.

**o Fact witness fees**

It is an historic anomaly that the Department of Justice, through the U.S. Marshals Service, presently pays the fees and expenses of fact witnesses for

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<sup>16</sup> At its March 1988 proceedings, the Judicial Conference, upon the recommendation of the Committee on Defender Services, adopted the following statement:

The Judicial Conference recognizes the importance of the advice of counsel for persons subject to proceedings under 18 U.S.C. §3142 *et seq.*, prior to their being interviewed by a pretrial services or probation officer. Accordingly, the Conference encourages districts to take the steps necessary to permit the furnishing of appointed counsel at this stage of the proceedings to financially eligible defendants, having due regard for the importance of affording the pretrial services officer adequate time to interview the defendant and verify information prior to the bail hearing.

defendants whose funds are limited, rather than having these costs charged to the CJA appropriation. Prior to the passage of the CJA, it was settled that the Department was to bear these costs rather than the Administrative Office of the U.S. Courts [See Rule 17(b) of the Federal Rules of Criminal Procedure; 39 Comp. Gen. 133 (B-139703, Aug. 27, 1959)]. Even after the enactment of the CJA in 1964, the Department continued to pay these costs since the provisions of the CJA were not viewed as a substitute for existing payment authorities.

With the 1986 amendment of 28 U.S.C. §1825, however, the U.S. Marshal was authorized to pay defense fact witnesses fees upon the certification of a federal public defender, assistant federal public defender or a clerk of court upon affidavit of other counsel appointed under the CJA. While this current arrangement is a significant improvement over the prior requirement that defense fact witness fees be certified by the U.S. attorney or assistant U.S. attorney, the continued assignment of responsibility to the Department of Justice for funding a portion of the costs of the defense perpetuates the appearance of a conflict of interest.

#### **o Non-custodial transportation of defendants**

18 U.S.C. §4282 requires that the U.S. Marshal furnish subsistence and transportation to an arrested but unconvicted person released from custody to the place of arrest or the person's residence. In addition, 18 U.S.C. §4285 authorizes a court to direct the United States Marshal to provide a financially eligible defendant released pending further judicial proceedings with funds, including subsistence expenses and the cost of non-custodial transportation to the court where his or her appearance is required.

Given the absence of an explicit statutory requirement, the Marshals Service recently has begun refusing to pay for the defendant's subsistence during the judicial proceedings, for the return trip to the defendant's residence, or for successive trips by the defendant to appear at subsequent judicial proceedings. In addition, there is no statutory provision for payment of the defendant's subsistence expenses, including food and lodging, during the judicial proceedings.



**Proposed Solution**

More than twenty years have passed since the last independent review of the Criminal Justice Act was undertaken. The program has grown substantially in size and complexity. In addition, panel attorney appointments have risen from 16,000 in 1966 to 65,000 in 1988. As the legislative history of the CJA reveals, the Congress intended to conduct further studies of the federal defender program. See supra note 3. In view of the importance of the program and the issues which have arisen, particularly concerning the judiciary's role in the creation and termination of a federal defender organization, the appointment, reappointment and compensation of federal public defenders, and the appointment and compensation of panel attorneys, a study similar to that completed by Professor Oaks should be undertaken. Accordingly, it is recommended that the Federal Courts Study Committee initiate a comprehensive review of the CJA, its implementation and administration. The purpose of the review would be to assess the current effectiveness of the CJA and to recommend appropriate legislative policy, procedural and operational changes.



# Management Structure of the District Courts

# **MANAGEMENT STRUCTURES OF THE DISTRICT COURTS**

**Submitted by**

**Court Administration Division  
Administrative Office of the U.S. Courts**

## **Summary**

There are two types of management structures currently in existence in the federal district courts: (1) the traditional structure which consists of a single clerk of court; and (2) a modified structure which includes a clerk of court and a district court executive. Although the traditional role of the clerk of court has been augmented during the last decade to include a variety of new administrative responsibilities, most district court clerks have little operational responsibility for the other component units of the court (i.e. bankruptcy court, probation, and pretrial services). The district court executive plays a much larger role in the overall administration of the district court. The administrative responsibilities of the district executive extend to the operations of the district court, bankruptcy court, probation and pretrial services.

There are advantages and disadvantages associated with both types of organizational structures. The traditional structure offers the advantage of having all the responsibility for the multiple administrative tasks of the district court reside in one office. The primary disadvantage is the increased administrative demands placed on clerks which makes it difficult for them to provide the appropriate level of personal involvement in every aspect of the clerk's office operation. The principal argument for utilizing an administrative structure with both a clerk and a district executive is that the responsibilities of administering all aspects of a district court may be too numerous and complex for one individual to manage. The potential negative effects of a dual executive system arise from the conflicts inherent in the division of responsibilities between two offices.

The process of determining which organizational structure will be most effective in the future must take into consideration court size, workload, budget constraints, automation and preferences of the court.

## **Recommendations**

There are no specific recommendations set forth in this paper.

## Comments

This main purpose of this paper is to provide the reader with a description of the two types of organizational structures in place in the federal district courts. Unfortunately, there are no proposals or suggestions for pilot projects that would enable the courts to evaluate different types of organizational structures. We believe that the issue of organizational structure in the district courts is an important aspect of court administration and one that deserves further examination. We note, for example, the attached report of the New York State Bar Association study of the District Court Executive Program. The report recommends the continuation of this program and its possible expansion in an effort to bring professional management expertise to large district courts. Perhaps, the Federal Courts Study Committee should suggest further study of the management structure of district courts, including study of the method used to select Chief Judges. (See attached letter of Chief Justice Callow.) This would appear to be an ideal project for the Federal Judicial Center.

## Management Structures of the District Courts

### Federal Courts Study Committee

Prepared by the  
Court Administration Division  
Administrative Office of the U.S. Courts

#### I. Background

Less than two decades ago, courts consisted of judges, a relatively small clerk's office and a few probation officers. Today, virtually all courts have more judges, larger district clerk and probation offices and several new units as well, including magistrates, a separate bankruptcy clerk's office,<sup>1</sup> and a separate pre trial services unit. Due to the growth in size and complexity of managing the operations of a district court, several organizational structures have evolved involving the use of highly trained professional administrators.

Under the general supervision of judges, there are basically two types of administrative structures in existence in district courts. They are: the traditional structure of a single clerk of court which exists in 84 courts; and an executive component that includes a clerk of court and a district

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<sup>1</sup>Under the 1984 bankruptcy court legislation, the bankruptcy courts were established as units of the district court. In 85 districts the bankruptcy judges have appointed their own clerk who operates a separate bankruptcy clerk's office. In the remaining five districts, the bankruptcy and district clerks' offices have been consolidated.

court executive, which currently exists in five courts.<sup>2</sup>

#### Clerk of Court as Principal Operating Officer

The Desk Book for Chief Judges of United States District Courts prepared by the Federal Judicial Center states: "Except in courts with district court executives, the clerk serves as the chief operating officer, implementing the court's policies and reporting to the chief judge. As the clerk of court is the officer to whom the chief judge delegates those administrative duties that can be delegated, the working relationship between the two is vital to the court's ability to manage its business."

The position of clerk of court is the most familiar of executive positions in the judiciary and has been in existence in one form or another throughout the history of the federal court system. The traditional and historical role of the clerk was the maintenance of the court's records and seal, the issuance of process, the entering of judgments and orders and the certification of copies of court records. The clerk's duties were nearly always confined to the clerical support required by judicial officers in the administration of justice. In the early 1970's the growth in the work load of federal courts which resulted from a steady rise in crime, the increasing litigiousness of the public and changes in jurisdiction, created a crisis in management. Chief Justice Warren Burger placed great emphasis on modernizing court operations. Institutions such as the Institute of Court Management began to train administrators specifically in the area of judicial administration, and a new wave of court administrators began to

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<sup>2</sup>There is one variation to these basic structures. Two districts utilize an administrative assistant to the chief judge as a part of the executive component, discussed infra.



arrive in district courts. Since the early 1970's the administrative responsibilities of the clerk of court have grown exponentially.

In addition to traditional duties, the range of administrative responsibilities for clerks now includes: budget preparation and management; space and facilities planning; procurement; personnel and training management; implementation of automated systems; coordination of special services such as speedy trials, alternative dispute resolution programs, trial advocacy programs, magistrate merit selection panels, and liaison with the Administrative Office, the Federal Judicial Center, the General Services Administration, the U.S. Marshals Service, the bar, the press, the circuit executives and the Judicial Council. In some courts the clerk may coordinate the provision of these services to the probation office, pretrial services office and the bankruptcy court. As noted, there are five courts that have consolidated the district and bankruptcy operations under one clerk of court.

There has been increasing use of mid-management positions to provide clerks with assistance in managing their expanded administrative responsibilities. These positions include administrative managers, operations managers, administrative analysts and systems managers (the latter of which has been essential to the development of automated systems). Thus, in most instances clerks have developed specialized, highly trained staffs which assist them in meeting the administrative demands placed on them by the court.

A great deal of diversity in the range of responsibilities of the clerk exists throughout the federal court system. Many clerks perform virtually all the listed administrative responsibilities independent of the chief judge while others rely on the chief judge or committees of judges to perform these tasks. Most district court clerks today have little operational responsibility for the other component units of the court (i.e. bankruptcy court, probation and pre trial services offices) and therefore do not actually function as a chief operating officer for the district.

#### **District Court Executive as Principal Operating Officer**

The position of district court executive was authorized by Congressional appropriation in 1981 at the request of the Judicial Conference as a pilot program designed to relieve chief judges in larger courts of the heavy administrative burdens imposed on them. Five districts were selected as the initial pilot courts - New York, Southern; California, Central; Michigan, Eastern; Florida, Southern; and Illinois, Northern. Subsequently, the court in the Northern District of Illinois withdrew and the Eastern District of New York was authorized to participate. A sixth district was permitted by Congress in 1983, and the Northern District of Georgia was selected. Presently, there are five district court executives, with the position in the Central District of California vacant.

The Federal Judicial Center conducted a study of the district court executive pilot program in 1984, concluding that : "The chief judges who carry the prime responsibility for administrative operations in the pilot

courts are convinced that the benefits to the courts seen during the pilot program have been substantial and should be assured by continuation and expansion of the program." In March 1985, the Judicial Conference adopted a resolution requesting that Congress establish the district court executive program on a permanent basis. The legislation suggested to Congress provided that each district court with eight district judgeships or more may appoint a district court executive. To date this legislation has not been passed by Congress.

In those courts currently participating in the pilot program, the allocation of administrative responsibilities varies widely. In most cases district court executives are charged with all or most of the responsibilities for the following duties in relation to the operation of district court, bankruptcy court, probation and pretrial services offices:

1. Arranging meetings, preparing agendas, and serving as secretariat to ad hoc or standing committees of judges of the court.
2. Reviewing and recommending changes in the local rules, the Jury Selection and Service Act Plan, the Speedy Trial Plan and the Criminal Justice representation plan.
3. Serving as public relations officer and representing the court as its liaison to the state bar associations, civic groups, etc.
4. Equal employment opportunity administration.
5. Establishing and maintaining a space management program.
6. Coordinating the court security program to insure the adequacy of protective services.

Generally, the responsibility for supervising court reporters and court interpreters, formulating annual budgets for the court, serving as the

court's public relations officer, establishing and maintaining property control records, and performing research are divided between the district court executive and the clerk. In the addition to traditional duties, in most instances, the clerk maintains responsibility for the court's personnel system, development and implementation of training programs and attorney admission functions.

## II. Perceived Problems

The district courts have grown dramatically over the last two decades. The case load has multiplied steadily, new causes of action have been created, recent statutes have imposed new procedural and administrative responsibilities on the courts and their component units, and the number of judges, magistrates and supporting staff have increased noticeably. Moreover, the courts are adapting to automation, case management challenges and resource shortages.

To cope effectively with the new realities the district courts need highly competent managers and effective administrative structures. In short, today's district courts present a very difficult environment that demands a high level of performance by the executive component of the court as well as the highest level of cooperation and communication between the executive component and the chief judge.

### III. Previously Proposed Solutions

Each of the organizational structures has advantages and disadvantages in dealing with the management challenges presently faced by the courts.

The concept of the clerk as chief operating officer responsible for administering the non-judicial activities of the court is the most widely accepted organizational structure. The advantages of this system are that all the responsibility for the multiple administrative tasks of the district court reside in one office, with highly qualified line staff and a single chain of command. In this setting, policies are more concise and consistent and administrative authority is centralized. The relationship between the executive component and the chief judge is a critical area in court management, and a single executive responsible for all areas of the court seems to facilitate this relationship. Even with an autonomous bankruptcy clerk's office and autonomous probation and pre trial services offices, the clerk of the district court may assist these units in certain administrative matters.

A system utilizing a single administrative officer might further assist in the recruitment and retention of highly qualified administrators. The quality of individuals appointed as clerk of court has clearly increased over the past decade. Another apparent advantage to the single executive structure is the increased accountability in all areas of the clerk's office.



There are also some apparent disadvantages to this type of structure. The increased administrative demands placed on clerks, especially in areas requiring technical expertise, make it difficult for them to provide the appropriate level of personal involvement in every aspect of the clerk's office operation.

The principal argument for utilizing an administrative structure with both a clerk and district court executive is that the responsibilities of administering all aspects of a district court may be too numerous and complex to lodge with one official. With two senior level positions, the clerk would revert to being responsible for the traditional functions of a clerk outlined above, while the district court executive would assume the wider ranging management and service functions. This would allow for more specialization between a court's two senior administrative officers. Moreover it has been argued that the district court executive may be more neutral in parceling out resources among units of the court family, i.e., district clerks' offices, bankruptcy clerks' offices, probation and pretrial services.

The potential negative effects of a dual executive system include the inherent conflict that often arises upon the division of responsibilities. Bifurcation of responsibility may lead to confusion, conflict and inefficiency. An additional layer of bureaucracy between the clerk and the judges could make the relationship between the clerk's office and the chief judge less effective. Finally, without proper funding, the district court

executive may draw staff from an already overburdened clerk's office, as well as other units of the court, which may make it more difficult to optimize court resources.

As pointed out in footnote 2, an administrative assistant has been added to the staff of the chief judge in two district courts. In these courts, a lower graded person performs some of the lesser administrative duties currently performed by the clerk. Confusion and conflicts over administrative turf that may occur between a clerk and a district court executive are far less likely to occur with a lower graded person on the staff of the chief judge. Of course, there is always the possibility of a turf problem particularly where the clerk perceives the creation of a barrier to access to the chief judge.

#### Summary

Regardless of which structure is followed for organizing the work of the district court, there is no question that managing district courts is very different from what it was just a decade ago. Variations in court size, case load and a diversity of regional and geographic factors require flexibility in the executive component on a national level to accommodate the diverse needs of individual courts. The largest clerks' offices have staffs in excess of 150 deputy clerks while the smallest have staffs of fewer than 15. Many courts are housed at one headquarters while others maintain as many as six divisional offices, and district areas range from the size of Rhode Island to the size of Alaska.

Each of the executive component structures outlined present significant advantages and disadvantages to the efficient administration of the federal court system. The process of determining which organizational structure will be most effective in the future must take into consideration court size, work load, budget constraints, automation, and preferences of the court.

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## COMMERCIAL AND FEDERAL LITIGATION SECTION

## OFFICERS

1989-1990

## ROBERT L. HAIG

Chair

101 Park Avenue

33rd Floor

New York, NY 10178

212/808-7715

## MICHAEL A. COOPER

Chair-Elect

125 Broad Street

New York, NY 10004

212/558-4000

## SHIRA A. SCHEINDLIN

Executive Vice-Chair

140 Cedar Street

New York, NY 10006

212/408-4000

## RICHARD E. DONOVAN

Secretary

101 Park Avenue

33rd Floor

New York, NY 10178

212/808-7758

## ELLEN M. COIN

Treasurer

800 Third Avenue

New York, NY 10022

212/371-6100

## MICHAEL S. OBERMAN

Delegate to the House  
of Delegates

919 3rd Avenue

41st Floor

New York, NY 10022

212/715-9294

New York State Bar Association<sup>®</sup>NEW YORK STATE BAR ASSOCIATIONCOMMERCIAL AND FEDERAL LITIGATION SECTIONREPORT OF COMMITTEE ON THE DISTRICT EXECUTIVE PROGRAMIN THE FEDERAL COURTSINTRODUCTION

This report considers the ongoing experiment commenced in 1981 to bring professional management expertise to the district courts in the form of the District Court Executive. The program now exists as a pilot program in five district courts. Legislation introduced in the last Congress would have provided permanent authorization and expanded the program to approximately twenty-two district courts while amendments to that legislation were discussed which would have eliminated the District Executive program altogether. In the end, no action was taken in the 100th Congress on the District Executive program, but legislation may be enacted in the current Congress. Because two of the five District Executives are serving in the Southern and Eastern districts of New York, it seems appropriate for this Association to study the program at this time. This report discusses the circumstances leading to the creation of the District Executive position and the functions performed by the District Executive in the Southern and Eastern Districts. In addition, the Committee offers its conclusions and recommendations as to the future of the program.

In preparing this report, the Committee interviewed the incumbent District Executives of the Southern and Eastern Districts of New York, the former Assistant District Executive of



the Southern District, the Chief Judges of the Southern and Eastern Districts, the former Chief Judge of the Eastern District, and the Circuit Executive of the Second Circuit and others. In addition, the Committee conducted a survey among all active and senior judges in both districts.

#### BACKGROUND - TRADITIONAL MANAGEMENT OF DISTRICT COURT

The sheer size of a large district court is seldom appreciated, even by those attorneys who have regular dealings with the court. In addition to the judicial officers and their immediate staff, most large district courts have a clerk's office, probation office and pretrial services office, as well as a bankruptcy court and bankruptcy clerk's office. The staffs of the Southern and Eastern Districts (exclusive of court reporters) are currently as follows:

	<u>SDNY</u>	<u>EDNY</u>
ACTIVE JUDGES (AUTHORIZED)	27	12
SENIOR JUDGES	18	3
CHAMBERS STAFF	120	39
MAGISTRATES	10	5
MAGISTRATES' STAFF	18	10
CLERK	155	85
PRETRIAL SERVICES	27	--
PROBATION OFFICE	125	112
BANKRUPTCY JUDGES	7	6
BANKRUPTCY CHAMBERS STAFF	14	12
BANKRUPTCY CLERK	44	32
TOTAL	<u>561</u>	<u>316</u>

The managerial framework provided by statute for these large organizations is sparse. Although management of the district courts is vested in the court, consisting of all the Judges in the District, there is little amplification as to what this means. The chief judge who presides over the court has few specified powers (see 28 U.S.C. §136). Nonetheless, the chief judge has long been considered the focus of the court's management. Although the judges of the district courts do retain all policy making prerogatives as a collective group, it is up to the chief judge to implement such policies, with a greater or lesser degree of discretion depending upon the relationship between the chief judge and the other judges.

Despite the heavy responsibility placed upon the chief judge of a large district court, the staff available to the chief judge is extremely limited. In addition to the one secretary and two law clerks that each sitting district judge may hire, the chief judge is authorized to hire an additional law clerk or secretary. Although it is within the ambit of acceptable tradition for the chief judge to assume a smaller caseload, the chief judge may be under pressure to carry as full a caseload as possible because of the backlog of cases and unfilled judgeships.

While the chief judge has generally looked to the clerk of the court to carry out many court-wide administrative functions, the clerk is often ill-equipped to handle the tremendous range of administrative responsibilities in the larger district courts. The clerk's responsibilities for records maintenance and manage-

ment of case flow through the court often limit the clerk's ability to handle additional matters. Moreover, the clerk's experience may be limited to clerical matters that do not prepare the clerk to take broad administrative charge of the court. Unlike in an earlier era when the functions and routines of courts varied little from year to year and the clerk could provide ample administrative assistance to the Chief Judge while performing clerical functions, a rapidly changing litigation environment now requires that professional management be employed to oversee the administration of the largest district courts.

The number of judges and other personnel in the largest district courts alone makes their management difficult; they have certainly become too large for all of the judges to participate in "hands on" management decisions. For instance, in the Southern District, the largest district court, there are currently 19 committees, the largest with nine judges, each concerned with a particular aspect of the court's business, e.g. rules, housing and space, magistrates. While the Board of Judges, consisting of all of the Judges of the Court, still has the final voice, most important work is done in the committees. Such dispersed decision-making requires strong staff support which the clerk may not be able to provide.

#### ORIGIN OF DISTRICT EXECUTIVE PILOT PROGRAM

In the larger and busier courts, it became necessary to develop alternatives to traditional approaches to district court management. In 1979, Chief Justice Burger proposed to the Conference of Metropolitan District Chief Judges a pilot program for

the position of District Court Executive. Congress appropriated funds for a District Executive and secretary in five districts' and these District Executives assumed their positions in the spring of 1981. The five original districts were, in addition to the Southern and Eastern Districts of New York, the Central District of California (Los Angeles), the Eastern District of Michigan (Detroit) and the Southern District of Florida (Miami). In 1983, Congress added the Northern District of Georgia (Atlanta) to the Program.

A draft statement of functions of the District Executive prepared by the Chief Justice in 1979 has served as the touchstone for District Executive duties in all subsequent discussions. It stated

"The district court executive shall be the chief administrative officer of the court operating under the supervision and direction of the chief judge and shall be responsible for the management of all non-judicial functions and activities of the court and of all of its component offices including the magistrates, the probation office, the pretrial services agency where applicable, and the respective clerks' offices in the district court and in the adjunct bankruptcy court."

There follows an extensive list of specific duties, the full text of which is annexed as Exhibit A. In brief, District Executives were to perform the following functions:

1. Serve as secretary to the judges and implement rules, regulations and orders of the court
2. Study and recommend changes to the local rules
3. Serve as the court's public relations officer
4. Administer the court's personnel system
5. Serve as Equal Opportunity Employment Administrator
6. Develop training programs
7. Supervise reporters and interpreters
8. Formulate annual budgets
9. Coordinate the use of court space management, including liaison with general services administration ("GSA") and

- administrative office of U.S. Courts ("AO")
10. Oversee the court security program
  11. Oversee the court's use of furniture
  12. Prepare and maintain property control books
  13. Process the paperwork in connection with the admission and discipline of attorneys
  14. Conduct studies concerning the business of the court and make appropriate recommendations
  15. Discharge such other duties as assigned by the court and chief judge

The District Executive position is classified as a GS-16 or GS-17 with a current maximum annual salary of \$75,500. The annual cost of the District Executive consists of the salary and benefits paid to the District Executive and the cost of a secretary, which approximate \$112,500, exclusive of occupancy costs.

#### **IMPLEMENTATION OF PILOT PROGRAM IN SOUTHERN AND EASTERN DISTRICTS**

##### **Southern District**

The Southern District Executive has become an integral part of the administration of the Southern District. In essence, the District Executive of the Southern District operates as a management assistant to the Chief Judge and the Court and is responsible for all non-judicial functions in the courthouse. The heads of the various other offices in the Court report to the Chief Judge through the District Executive on non-judicial matters. The Southern District Executive, like the Eastern District Executive, relies on a staff larger than the one secretary that is appropriated by borrowing additional personnel from other offices in the Court. The Southern District Executive's staff includes an Assistant District Executive, a budget analyst, a property and procurement specialist, an assistant property and procurement specialist, two secretaries and a part-time legal assistant who



handles grievance matters for the Southern District's Grievance Committee.

The first District Executive in the Southern District was Robert Page, who came to the position from the National Center for State Courts. The present incumbent, Clifford Kirsch, has held the position since 1985. Prior to that Mr. Kirsch was Clerk of the Bankruptcy Court for the District of New Jersey and had held various administrative positions in the state court system of Pennsylvania.

Although the duties delineated by Chief Justice Burger describe many of the duties of the Southern District Executive, the Southern District Executive performs additional important duties. The Southern District Executive sits as secretary of all of the judges' committees of the Southern District, as well as of the Court's Board of Judges. In this capacity, the District Executive's regular contact with the judges facilitates the delegation of responsibilities to the District Executive. Because the Southern District is also a pilot district for decentralized budgeting, the budget for all components of the court is now prepared under the direction of the District Executive rather than by the A.O. and other federal agencies. With a budget that exceeds \$22,000,000 for 1988, this is a major undertaking which would probably be impossible under the ad hoc administration of the past.

To some extent, administrative changes external to the court system have made the need for a District Executive more compelling. For instance, because the G.S.A. has eliminated the

"supermarkets" from which various offices in the Court were once able to procure their equipment and supplies, the District Executive must now coordinate such purchases for all Court offices. Similarly, the GSA has shed most of its building management responsibilities in the case of single tenant buildings, such as the U.S. Courthouse in Foley Square, which leaves the District Executive responsible for the management of the building.

The Southern District Executive has assumed responsibility for many special projects that the Chief Judge could assume only with extreme difficulty. For instance, the Southern District Executive is currently the procurement representative for the Court in connection with the building of three new courthouses, serving essentially as the owner's representative for construction projects totaling \$150,000,000. The District Executive is also responsible for all phases of construction and rehabilitation within the existing courthouse. During the last two years, the office equipment throughout the Court has been automated pursuant to a uniform plan and the clerk's office was computerized under the guidance of the District Executive. The District Executive's office was primarily responsible for the creation of FedKids, the innovative day care project for children of government employees in the Southern District, and played a major role in the development of a new system for the assignment of cases to magistrates.

#### Eastern District

The initial District Executive was Richard Weare, who moved directly from being the Clerk to District Executive. He was

succeeded in 1985 by Douglas Dodge, who had previously held a variety of administrative positions in the New York and Pennsylvania state court systems and the National Center for State Courts. The staff of the District Executive in the Eastern District includes a secretary, an assistant for space and facilities, three system support specialists engaged in implementing new computer systems in the Court, and three interpreters and a secretary for them.

In contrast to the Southern District Executive, the Eastern District Executive does not attend the Court's policy-making sessions. While the Board of Judges in the Southern District meets with the District Executive, the Eastern District Executive does not attend, let alone act as secretary for, these meetings. Thus, the Eastern District Executive is one step removed from the Court's basic decision-making process. As a result, the Eastern District Executive functions more as an executive assistant to the Chief Judge than as a management assistant for the Court.

While there is no written charter for the District Executive in the Eastern District, the routine duties for which he is responsible closely parallel those in Chief Justice Burger's original description. The Eastern District Executive is now responsible for the completion of the automation of clerical systems and planning for a new annex for the court. Many of the budget and housing functions of the Southern District Executive are not part of the Eastern District Executive's duties as they have been retained by the AO and the GSA in the Eastern District.

### SURVEY OF JUDGES IN THE SOUTHERN AND EASTERN DISTRICTS

In an effort to gauge how the individual judges in the Southern and Eastern Districts view the District Executive position, the Committee prepared and sent a survey to each of the judges in both districts. The survey posed the following six questions about the District Executive program:

1. What is the nature and extent of your contact with the District Executive?
2. Do you think the role of the District Executive is adequately defined?
3. Is the District Executive position an appropriate allocation of judicial resources? Might the \$100,000 approximate cost of the District Executive be more effectively spent?
4. Do you believe the District Executive performs functions that could otherwise be undertaken by the Clerk's office, the General Services Administration, or some other entity?
5. Do you think that the District Executive should have more, less, or the same feel of responsibility as the District Executive currently has in your district?
6. If you were a District Judge prior to the appointment of a District Executive, do you think the presence of a District Executive positively or negatively influenced the administration of the Court? If possible, please give examples.

In addition, the survey invited the judges to make any general comments about the District Executive program.

Responses to the survey were received from 17 of the 42 active and senior judges in the Southern District and from 5 of the 13 active and senior judges in the Eastern District. Although signing the survey was made optional, almost all of the surveys returned to the Committee were signed.

### Southern District

Of the 17 Southern District judges who responded to the Committee's survey, 15 judges expressed the opinion that the District Executive's presence has improved the Court's administration, one judge stated that he had too little contact with the District Executive to offer any meaningful response, and one judge felt that the "office has merely added another unnecessary layer to the bureaucrats with which we must deal." Among the 15 judges who said the District Executive has had a favorable impact on the court, many expressed emphatic approval of both the District Executive position and the current incumbent.

Several themes emerge from the survey responses that the Committee received from the Southern District judges. First, although the overwhelming majority of Southern District responses concluded that the District Executive has had a positive impact on the Court, many responses suggested that this is the result of the way the Court and incumbent District Executive utilize the position, rather than a function of any mandated job description. Indeed, while nearly half of the judges questioned whether the position was adequately defined, many of these same judges concluded that the position has become useful in the Southern District. Several judges stated that any job description should remain flexible enough to be shaped by the changing needs of the Court.

Second, most of the Southern District judges expressed the view that the District Executive performs functions that could



not be reassigned to other court personnel. Several judges stated that the District Executive plays a unique role in the coordination of all Court personnel and the supervision of special projects, such as automation, centralized training and renovation projects that could not be reassigned to the clerk's office which, is already occupied with many routine functions. A number of judges also pointed out that because the District Executive is directly responsible to the Chief Judge and the Board of Judges, he may advocate views that are of special importance to the judges. In fact, one judge described the District Executive as the Court's "Chief of Staff."

The overwhelming view of Southern District judges is that the money spent to maintain the District Executive position is money well spent. Only one Southern District judge expressed the view that the District Executive is not an appropriate expenditure of the Court's resources. Most of the respondents were confident that the money spent on the District Executive position is necessary in view of the administrative burdens in the Southern District.

#### Eastern District

It is more difficult to generalize from the responses to the survey that were received from judges in the Eastern District of New York. While four of the five judges who completed surveys expressed significant reservations about the District Executive position in the Eastern District, these judges did not agree on what steps should be taken concerning the position.

Of the five Eastern District responses, two concluded that the position should be abolished, one concluded that the position has had no impact, one concluded that the position must be redefined and studied and one concluded that the position has had a highly beneficial impact on the Court and should be preserved.

Based on the survey responses, it appears that the Eastern District Executive has not become as central to the Court's administration as the Southern District Executive. Three of the survey respondents expressed doubts about what duties the District Executive performs and said that they have little or no contact with the District Executive. It may simply be that the individual district judges in the Eastern District have little contact with the District Executive and rely more on the Chief Judge to deal with the District Executive.

During the course of the Committee's interviews with Chief Judge Platt and former Chief Judge Weinstein, both judges expressed the view that the District Executive can perform useful functions that relieve some of the administrative burdens on the Chief Judge. Although Chief Judge Platt stated that the position should not be permitted to grow into a larger bureaucracy that encroaches on other court personnel, he felt that the presence of the District Executive has assisted him in maintaining a full case load. Former Chief Judge Weinstein said that the District Executive's presence helped him institute a variety of programs, including community outreach programs, during his tenure as Chief Judge.

#### RECENT LEGISLATIVE ACTIVITY

Since the initial appropriation in 1981, there has been no express action by Congress on the District Executive program and it now exists as an initiative of the Administrative Office of the United States Courts. Legislation introduced in the 100th Congress, First Session, as the "Judicial Branch Improvements Act of 1987" initially provided that "Each district court with eight district judgeships or more may, with the approval of the judicial council of the circuit, appoint a district court executive." There followed a list of specified duties virtually identical to that proposed by Chief Justice Burger. The floor of eight judges would have made the District Executive program available to 22 districts in 1987. In the waning days of the second session of the 100th Congress, the District Court Executive authorization was the subject of considerable informal discussion between the respective House and Senate Committees and the suggestion was made that the District Executive Program should be eliminated as a matter of budgetary austerity. Ultimately, authorization for expansion of the Program was removed from the "Judicial Improvements and Access to Justice Act" as enacted October 14, 1988, but there was no express provision to eliminate the existing program, which thus continues as a pilot program with an uncertain future.

As to the deletion of authorization for the District Executive Program, Senator Heflin, chairman of the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee, stated in his remarks on the floor:

"This bill represents numerous hours of negotiation and compromise. Let me comment on one provi-

sion which was included in the original bill S1482, concerning district court executives. The provision in S. 1482 would have expanded the six existing district court executive programs in courts with eight or more district court judges. This provisions [sic] was deleted from the bill as adopted by the Subcommittee on Courts and Administrative practice not on its merits, but because the subcommittee had not received sufficient information on which to evaluate this program. Therefore, this legislation does not address the existing programs... This is an issue which the subcommittee will probably revisit next Congress to give the Judicial Conference the opportunity to justify the retention or expansion of this program."

134 Congressional Record 16298 (Oct. 14, 1988).

The District Executive Program may also be considered by the Federal Courts Study Committee created as part of the Judicial Improvements and Access to Justice Act of 1988.

#### CONCLUSIONS AND RECOMMENDATIONS

Our Committee concludes that in a large district where the concept of a District Executive exercising delegated duties has been embraced by the Court, the presence of a District Executive can very substantially contribute to the effective management of the district court. It would seem that the management of the Southern District could have been accomplished at its present level of effectiveness in the absence of the District Executive only if the Chief Judge were to abandon many, if not all, of his judicial duties in favor of the Court's management. Forcing the Chief Judge to abandon his judicial duties would result in a loss of judicial experience and energy which the caseload of the Court can ill afford.

In a smaller court, such as the Eastern District, where the

Court still functions to a great extent as a unitary collegial body, where the AO and the GSA retain their traditional functions, and where size alone does not compel the Court to delegate more management duties, the contribution of the District Executive is not so indispensable to the running of the Court. While the number of employees in the Eastern District would suggest that full-time management expertise could be put to good use, the Eastern District seems less disposed to take as much advantage of the District Executive position. Although the Eastern District Executive may still make a contribution to the Court by enabling the Chief Judge to devote more time to the business of judging cases, the Eastern District Executive is not "responsible for the management of all non-judicial functions and activities of the Court" as envisioned by Chief Justice Burger. The contrast between the use of the Southern and Eastern District Executives shows that the well-established and widely varying traditions of judicial management at different district courts has considerable impact on the degree of utilization of District Executives.

Our study suggests that a District Executive will be most effectively employed in those larger judicial districts that have a compelling need for professional managerial expertise. Based on our study, the Southern District Executive has been more useful than the Eastern District Executive because the Southern District has a more compelling need for such professional management. To be sure, in all but the smallest district courts, the Chief Judge and the Court will benefit from the availability of a highly trained executive assistant to the Chief Judge in the form



of the District Executive. However, we believe the proper objective of the District Executive Program is to provide professional court-wide management for non-judicial matters so as to enable the judges of the court to delegate their management duties to the maximum extent practicable. Our observations indicate that this will happen only in courts with a minimum number of judges greater than the eight set forth in S. 1482 or possibly more than the ten active judges now sitting in the Eastern District. A study of all of the pilot districts is necessary to determine the minimum number, which is beyond the scope of this report.

The wide variety of styles of management in the various district courts suggests that the laundry list of duties enunciated in S. 1482 is not necessary and could impose an unnecessary limitation on the position. A more useful and shorter description of the functions contemplated in the introductory paragraph of Chief Justice Burger's 1979 draft (p. 5 above) may be more appropriate.

The Committee believes the provision of S. 1482 that "the District Court may appoint" (emphasis added) a District Court Executive is appropriate. Even larger courts should have latitude to appoint a District Executive only if the court believes the position will be useful. The experiences of the Northern District of Illinois and the Eastern District of Pennsylvania, both of which declined to participate in the pilot program in 1981, and the 18-month vacancy in the Central District of Cali-

fornia, suggest that courts should retain discretion to decide whether a District Executive would be useful to the Court's functioning.

June 19, 1989

New York State Bar Association  
Commercial and Federal  
Litigation Section  
Committee on the District  
Executive Program in the  
Federal Courts  
James N. Blair, Chairman  
Charles E. Dropkin  
Warren N. Stone

# Judicial Conference of the United States

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See the *Report of the Committee to Study the Judicial Conference*,  
Approved by the Judicial Conference, September 21, 1987.

This and other documents are located in the Archives of the  
Subcommittee, located at the Federal Judicial Center

**Judicial Councils**

**and**

**Federal Court Executives**

## **JUDICIAL COUNCILS AND FEDERAL COURT EXECUTIVES**

**Submitted by**

**Steve Flanders  
Circuit Executive  
Second Circuit Judicial Council**

### **Summary**

Judicial Councils were created in 1939 pursuant to the Administrative Office Act. Since that time the power of the judicial councils has been enhanced by numerous statutory authorizations and administrative actions. Passage in 1971 of the Circuit Executive Act provided professional staff to the councils and the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 added district judges to the membership and specified an elaborate mechanism for handling complaints alleging judicial misconduct.

Administrative matters are routinely referred to the judicial councils, both by statute and by Judicial Conference policy. The Judicial Conference and the Administrative Office vest in the judicial councils many of the hard choices that must be made within the Judicial Branch. The councils will often make decisions concerning the best use of scarce resources and provide advice to the Judicial Conference on national policy issues.

The author believes that because of the nature and design of judicial councils, they have to a great extent remained invisible bodies. The author also believes that councils operate best when they operate informally. Unfortunately, it is pointed out that this has resulted in the councils, at times, being overlooked in areas where they could play a very useful role. It is noted, for example, that the Administrative Office and Congress sometimes fail to consult councils on newly planned programs and initiatives that might benefit from council input. The author also notes that the invisible nature of councils has at times resulted in their being criticized for apparent inactivity in areas such as case management and/or being apparently insufficiently aggressive in handling complaints of judicial misconduct.

### **Recommendations**

The author believes that the present role of the councils, modest and comparatively invisible though it may be, constitutes a significant reason for caution in contemplating massive changes within the judiciary's geographic structure. The author believes that "the strength of the judicial councils rests upon the informal and professional character of the supervision that they achieve, which rests in significant part in turn upon the familiarity of



council members with the work of those whom they supervise." Any major changes in the structure of the federal judiciary could undermine the role of the judicial councils. The author notes that "this might happen if new supervisory units were more purely administrative (less judicial), and less trusted by the independent judiciary. It might happen also if supervisory units became so large that personal knowledge became attenuated and personal judgments could not be made and relied upon. Equally dubious would be supervision by units so small that parochial interests cannot be mitigated."

The paper suggests that judicial councils should be encouraged to act rather than only to react and that council activity and initiative may be strengthened and supported by more uniform rules on membership, especially on the model of relative equality between circuit and district judges.

#### Comments

The Federal Courts Study Committee might consider encouraging councils to experiment with the development of long-range planning mechanisms. Perhaps councils should be called on to develop "annual action plans" in areas such as case management, automation and space and facilities.

### JUDICIAL COUNCILS AND FEDERAL COURT EXECUTIVES

The judicial councils in each federal judicial circuit celebrate this year the 50th anniversary of their creation, which resulted from the Administrative Office Act of 1939. It is characteristic of these important bodies that no celebrations or observances of any kind will note this event. The present briefing paper for the Federal Courts Study Committee will summarize the development and present role of the judicial councils, with suggestions for improvement both concerning their place in judicial branch organization and structure, and in their operations.

The judicial councils are the regional governing bodies of the federal judiciary, a kind of board of directors for the circuit, district and bankruptcy courts within each circuit. As defined in 28 U.S.C. § 332 and elsewhere, the councils may choose their own structure. Moreover, in significant degree each may design its role in federal judicial administration within its circuit. Reflecting the circuits' diversity, the resulting choices vary greatly. In the vast Ninth Circuit this "board of directors" consists only of four circuit judges, four district judges and the chief judge of the circuit. In many of the smaller circuits the judicial council is much larger, and in several it contains all active circuit judges, so the resulting membership may be as large as 25, including the district court representatives (see Appendix A for a description of judicial council composition in each circuit).

The importance of the judicial councils lies in their status, in general, as the only body in the federal judiciary with supervisory power over independent federal judges and federal courts with regard to administrative questions (short of the impeachment power, vested by the Constitution exclusively with Congress). This structural fact yields an important place for the judicial councils in the relation between the Judiciary and the other branches of the government, especially Congress. When public issues arise concerning the effectiveness or ineffectiveness of federal judicial administration, the institutional response of the judiciary must often rest in significant part upon reliance on judicial council action (actual or potential) under the supervisory powers defined in 28 U.S.C. §§ 332(d) and 372(c).

### History

The councils were created in the 1939 Act as a part of an explicit Congressional choice to avoid detailed supervision of the work of the individual federal judges and courts from Washington. (See, e.g., Peter Fish, "The Circuit Councils," pp. 205-210; Flanders and McDermott pp.3-5.) Chief Justice Charles Evans Hughes and Fourth Circuit Chief Judge John J. Parker had particularly pressed for this component. They wished to avoid what Hughes called the "undue centralization" embodied in an earlier version of this Act, and to establish in the circuits a supervisory power that Parker regarded as essentially unlimited.

Not only matters of judicial misconduct were encompassed but also the entire range of administrative matters, including case management, reassignment of judges, and so on (See Fish, "Judicial Councils", p. 207 for a very interesting list culled from the testimony of supporters of what became §332(d)).

There have been two general statutory enhancements to the councils, and numerous highly specific increments by statute to their power (Appendix B). Numerous administrative actions have added to their powers as well (Appendix C). Passage in 1971 of the Circuit Executive Act (28 U.S.C. § 332(e)) provided staff for the first time, though the number was and remains modest (now a total of 82 professional and secretarial staff to the twelve circuit executives). The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, among other provisions, added district judges to the membership and specified an elaborate mechanism for handling complaints alleging judicial misconduct. The judicial councils have been assigned statutory responsibility to review required district court plans in such diverse areas as speedy criminal trials, jury selection, and representation of indigent defendants. They have new and important responsibilities under the Rules Enabling Act and various Federal Rules to supervise and evaluate local rules. By a recent count in the Ninth Circuit there are 23 specific statutory grants of power to councils. The same effort enumerates 19 administrative delegations by the Judicial Conference of the United States or the Administrative Office of U.S. Courts.

The councils have been revisited and re-evaluated with sufficient regularity that one detects a persistent and possibly permanent unease with their informal and sub rosa mode of operation. Comprehensive reports by the Judicial Conference appeared in 1961 and 1974, followed by a Federal Judicial Center evaluation in 1978 (conducted for a Conference committee). A comprehensive evaluation from the Ninth Circuit is in draft at this time.

#### Current Status

After 50 years the judicial councils are both much more and much less than the legislative sponsors imagined, for the tiny federal judiciary they knew. (Every circuit in 1939 had fewer district and circuit filings than any circuit today; indeed, the U.S. Courts of Appeals for the Ninth Circuit is today larger than the entire appellate judiciary of 1939, with nearly twice the total national case load of 1939!) The work of the councils has turned out to be episodic rather than continuous, and to involve or necessitate numerous discrete actions on disparate topics. Like a board of directors, councils are available for consideration of action when trouble arises; unlike a board of directors, the system requires of them actions on an astonishing range of highly particular matters, including decisions as inconsequential as determining whether a judge who claims to be behind may hire an incoming law clerk three to four weeks before the predecessor clerk departs.

A small sampling follows of matters routinely referred to the judicial councils, by statute or by Judicial Conference policy:

- determining whether a senior judge is fit for judicial service.
- Determining whether a senior judge is entitled to chambers and staff, and the appropriate staff level in relation to the work the judge does.
- Determining whether a judicial district should have a federal public defender (an office staffed by government employees), or a contract "community defender."
- Supervising juror utilization by the district courts in the circuit.
- Establishing priorities among proposed construction projects in facilities throughout the circuit.
- Determining whether the problems suffered by an overworked judge, and the judge's work, justify an emergency law clerk on a temporary basis, or an emergency secretary.
- Acting upon complaints alleging judicial misconduct.

The structure and operations of the councils are diverse, as already noted, and we will avoid belaboring the point here. The size of the councils varies by nearly a factor of three, and they have as many as twenty-two committees or as few as none, and meet as seldom as twice each year (the minimum prescribed by statute), or as often as six times. A few councils are programmatic bodies through an annual "Action Plan" or similar device; most are purely reactive as initiatives reach them from elsewhere. In several, most business is conducted by mail. Successive actions of the Judicial Conference of the



United States and the Administrative Office of the U.S. Courts (also in lesser degree the Federal Judicial Center) vest in the judicial councils many of the hard choices that must be made within the Judicial Branch. Sometimes this is done as a formal matter of "delegating" to the council a decision, usually of a character that is difficult to address in Washington because it pits one judge or court against another. Often these are actual or potential conflicts among independent judicial bodies concerning the best use of scarce resources. Often also the councils are employed by seeking their advice rather than a decision; this is often done by Judicial Conference committees. For example, in 1986 the Committee on the Budget sought recommendations from each council as it implemented the Gramm/Rudman/Hollings budget cutbacks; in this instance as in others, a Judicial Conference body charged with setting national policies found it helpful to seek council advice before defining a national course of action.

#### PERCEIVED PROBLEMS

The literature concerning the judicial councils is largely a litany of criticism. Professor Peter Fish, in an article subtitled "Rusty Hinges of Federal Judicial Administration," in 1970 described the judicial councils as "pillars of passivity." In addition to the recurrent criticism that the Judicial Branch, through judicial councils, has been insufficiently aggressive concerning complaints alleging judicial

misconduct (addressed in the Briefing Paper on that subject), the criticisms focus especially on the apparent inactivity of the councils. Moreover, by implication or sometimes explicitly, the councils are regularly faulted for any identified or perceived fault in federal judicial administration generally. When the General Accounting Office some years ago criticized juror utilization by U.S. district courts, it was especially the judicial councils who were criticized for inactivity--GAO in this instance and others seems inclined to regard the judicial councils as a kind of ineffective corps of inspectors general.

By their nature and their design, the judicial councils are almost invisible, because they operate best when they operate informally. Because they rarely appear in the press or in any other urgent context (except when something goes terribly wrong), there has been an occasional habit of omission of the judicial councils from contexts in which they might serve well.

Frequently, initiatives of the Administrative Office or of Congress that might well use judicial council contributions, do so only when the significance of judicial councils is drawn to someone's attention at a comparatively late stage.

While the councils are criticized for inactivity in supervising docket management and similar matters, they have been criticized also as intruding impermissibly or unconstitutionally upon judicial independence. It may be, however, that these perceptions are less now than ten or twenty years ago. While there have been legal attacks on the constitutionality of council

actions taken on misconduct matters, there seem to be no broad-based attacks in recent years that run much deeper than the ordinary grouching that takes place in the judicial branch--as in other organizations--when proud persons of substance and power find that power over themselves is held by others. At the same time, councils are learning to exercise their supervisory powers more delicately and effectively, especially in the sensitive and difficult area of supervision through use of statistics (see Flanders and McDermott, Appendix D).

#### PROPOSED SOLUTIONS

It appears that the criticisms of judicial councils have lessened significantly in recent years, following the significant statutory changes that took effect in 1972 and 1981. And apart from the issue of judicial misconduct, which has taken on a new and urgent form now that an unprecedented concentration of impeachment proceedings has reached Capitol Hill, there seem to be few comprehensive reforms to the judicial councils on anyone's agenda at this time. As already suggested, we believe much criticism of councils is misplaced, if understandable. It flows from the fact that councils do not publicize their activities, and from the unavoidable difficulty of supervision in any professional context, especially one made more difficult by Article III protection.

The circuit executive liaison group suggests that the Federal Courts Study Committee, in its deliberations concerning

the present and future structure of the federal judiciary, rely upon the roles of the judicial councils as bodies that mediate between the judiciary and the other branches. The legislative and executive branches, and the public, require a device to supervise the judiciary in a professional and acceptable fashion. It is not difficult to imagine a restructuring of the federal judicial establishment that could undermine the judicial councils. This might happen if new supervisory units were more purely administrative (less judicial), and less trusted by the independent judiciary. It might happen also if supervisory units became so large that personal knowledge became attenuated and personal judgments could not be made and relied upon. Equally dubious would be supervision by units so small that parochial interests cannot be mitigated.

The present role of the councils, modest and comparatively invisible though it may be, constitutes a significant reason for caution in contemplating massive changes within the judiciary's geographic structure. The strength of the judicial councils rests upon the informal and professional character of the supervision that they achieve, which rests in significant part in turn upon the familiarity of council members with the work of those whom they supervise. As Chief Justice Hughes said in 1938, pressing sensibly for a decentralized mechanism of judicial administration, "when you come to the supervision of the work of the judges, there you have the great advantage of supervision of that work by the men who know. The

circuit judges know the work of the district judges by the records that they are constantly examining, while the Supreme Court gets only an occasional one."

Even in a much larger judiciary, this has proven a prescient observation that led to a sound approach. When a judge makes a questionable request or behaves questionably, the council knows the judge well enough to evaluate the matter, yet not so well that it must accede to the judge's whim or desire. On matters that concern allocation of scarce resources, a requirement of council approval may be a valuable "yellow light."

Supervision of the work of professionals is a delicate matter in any context. One need look no farther than to the tortured mechanisms employed in closely related bodies like law partnerships or tenured university faculties. Supervising the quantity of work done by any body of professionals is exceptionally difficult. And the work of judicial councils is rendered still more delicate by the independence accorded the judiciary in Article III. Councils and their chief judges need to explore and refine continuously their capacities in the exercise of their delicate powers. The deft and effective application of statistical measures in this delicate context is an important matter for continuous refinement, and refined staff work.

The judicial councils might well be encouraged to act rather than only to react. One way to accomplish this might be for the Judicial Conference of the United States to request each

chief circuit judge to report orally each year on the work of the circuit council. A mutual sharing of positive programs in this way might support a new mutual perception of the councils and their role.

It may be that council activity and initiative would be strengthened and supported by more uniform rules on membership, especially on the model of relative equality between circuit and district judges. The experience has been excellent with that model, in the Fourth and Ninth Circuits, most notably.

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Circuit executives and district court executives have assumed diverse roles in the varied environments already described. Creation of these new posts is part of a steady professionalization of court management generally over the past 20 years, in state and federal courts. Circuit executives and their modest staffs serve as a kind of administrative director in some circuits, only in a staff relation to the judicial council in others, or perhaps as a kind of "first among equals" among senior administrative staff throughout the circuit. District court executive positions are much newer and even less institutionalized. Recent evaluations indicate that the program has been highly successful in districts of exceptional size, such as the Southern District of New York.



Appended to this Briefing Paper is an earlier survey of circuit and district court executive positions. It has seemed best to treat these issues separately in this way, as the discussion thus far would have been burdened by tangential discussion of staff issues at each point.

Steven Flanders, for the  
Circuit Executive liaison  
group to the Federal Courts  
Study Committee,  
Circuit Executive, 2nd Circuit  
July 7, 1989  
Assisted by comments of  
numerous other circuit  
executives, and others

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## APPENDIX A

### Composition of Judicial Councils

#### D.C. Circuit:

All active circuit judges; from the District Court for the District of Columbia, the chief judge and five elected district judges.

#### First Circuit:

All active circuit judges; three district judge representatives, including a permanent representative from the District of Massachusetts and the District of Puerto Rico (the most senior active judge from each), and a third seat that rotates among the districts of Maine, New Hampshire, and Rhode Island.

#### Second Circuit:

All active circuit judges; one elected district judge (generally the chief judge) from each district.

#### Third Circuit:

All active circuit judges; one elected district judge (generally the chief judge) from each district.

#### Fourth Circuit:

Five circuit judges and four district judges; the chief circuit judge is a permanent member, and the remaining circuit and district judges are the most senior active judges within a particular state. They serve for a four-year term, after which that state is unrepresented for one year (there are five states in the Fourth Circuit).

#### Fifth Circuit:

All active circuit judges; an elected district judge from each district.

Sixth Circuit:

All active circuit judges; five district judges, one elected at large, and the remainder the most senior within each of the four states in the circuit.

Seventh Circuit:

All active circuit judges; four district judges, including the district judge representative to the Judicial Conference of the United States, and the most senior active district judge from each of the three states in the circuit.

Eighth Circuit:

All active circuit judges; seven district judges, one elected to a two-year term from each state within the circuit.

Ninth Circuit:

Four circuit and four district judges, plus the chief judge of the circuit. The circuit judges are the heads of each of the four administrative units of the circuit. The district judges include the representative to the Judicial Conference of the United States, the President of the District Judges Association, and two judges elected by the chief district judges of the circuit.

Tenth Circuit:

Six circuit judges by seniority; four district judges, including one chief judge elected by the chief district judges and three elected by the District Judges Association.

Eleventh Circuit:

All active circuit judges, six district judges, including the representative to the Judicial Conference of the United States, two elected by the District Judges Association, and one district judge from each of the three states in the circuit designated by the chief judges of those courts.

## APPENDIX B

### Statutory Authorizations

28 U.S.C. sec 134(c) - Tenure and residence of district judges. Council may issue orders as to where judge(s) should maintain residence.

28 U.S.C. sec. 137 - Division of business among district judges. If chief judge, or judges of the district cannot agree upon rules for the division of business, the council shall do so.

28 U.S.C. sec. 140(a) - Adjournment. With consent of judicial council, district court may pretermitt court sessions for good cause.

28 U.S.C. sec. 152(b)(1)(d)and(e) - Appointment of bankruptcy judges. Judicial council will assist AO in determining the official duty stations of bankruptcy judges. Council may also, with judges' consent, recall retired bankruptcy judges to serve in any judicial district within the circuit.

28 U.S.C. sec. 155 - Temporary transfer of bankruptcy judges. Judicial council may transfer active bankruptcy judges to serve temporarily in another district. Council may also, with judges' consent, recall retired bankruptcy judges to serve in any judicial district within the circuit.

28 U.S.C. sec. 156(b)and(c) - Staff expenses. Judicial council and AO to receive certification that number of cases pending within a district justify requests for the appointment of a bankruptcy clerk. Utilization of facilities or services by bankruptcy courts are subject to conditions and limitations prescribed by the council.

28 U.S.C. sec. 158(b)(1)(Bankruptcy) - Appeals. Judicial council may establish a bankruptcy appellate panel to hear and determine bankruptcy appeals.

28 U.S.C. sec. 294\*e) - Assignment of retired Justices or judges to active duty. Chief Judge or judicial council may assign retired Justices or senior judges to judicial duties within the circuit.

28 U.S.C. sec. 295 - Conditions upon designation and assignment. No designation or assignment of a circuit, district, or bankruptcy judge in active service shall be made without consent of chief judge or judicial council of the circuit from which the judge is designated.

28 U.S.C. sec. 332(d) - Judicial councils of the circuits. Councils shall make all necessary and appropriate orders for the

effective and expeditious administration of justice. Including: issuing subpoenas, holding hearings, taking testimony, appointing a circuit executive, delegating responsibility to circuit executive, etc.

28 U.S.C. sec. 372(b) and (c) - Retirement for disability; substitute judge on failure to retire; judicial discipline. Certificate of disability, signed by majority of judicial council and approved by the President, is grounds for new appointment. Judicial council to review complaint investigations, conduct further investigations, and take appropriate actions.

28 U.S.C. sec. 457 - Records; obsolete papers. Judicial council may designate where records of circuit, district, and bankruptcy courts may be kept.

28 U.S.C. sec. 462(c) and (e) - Court accommodations. The judicial council must approve the provision of chambers for circuit judges at places other than where regular sessions of court are authorized. The judicial council may approve court accommodations, accommodations for probation officers, pretrial service officers, and Federal Public Defender organizations. Accommodations are to be provided by the AO.

28 U.S.C. sec. 633(b) - Determination of numbers, locations and salaries of magistrates. The U.S. Judicial Conference shall determine the number, locations, and salaries of magistrates to be allowed. This determination shall be made in light of the recommendations of the judicial council, the district courts, and the AO.

28 U.S.C. sec. 635 - Expenses. Judicial council recommends to the Conference approval of necessary legal, clerical and secretarial assistance, etc. for magistrates. In addition, the Judicial Council must approve provision of leased space for magistrates by the GSA.

28 U.S.C. sec. 753(g) - Reporters. If the Judicial Council, upon the advice of the chief judge of any district court, determines that number of reporters is insufficient to meet temporary demands, including senior judge needs, and council notifies the AO, the AO will contract with a court reporter to serve the district court.

28 U.S.C. sec. 1863(a) - Plan for random jury selection. Each U.S. district court shall devise a plan for selection of jurors that is subject to approval of a panel consisting of the members of the Judicial Council and either the chief district judge or the chief judge's designate. Council may review and, if necessary, remedy any misapplication of juror exclusion provisions.



18 U.S.C. sec. 3006A(a) and (d)(1) - Adequate representation of defendants. Judicial Council to approve each district court's plan to furnish representation for persons unable to afford legal representation. Judicial Council may recommend use of a "high rate" of compensation to attorneys in specific districts to the Judicial Conference, which has authority to increase the rate within statutory limits.

18 U.S.C. sec. 3152 - Establishment of pretrial services. Eighteen months after the enactment of the Pretrial Services Act of 1982, if a district court and the judicial council recommend the establishment of pretrial services, such services shall be established by the AO

18 U.S.C. sec. 3165(c) - District plans. Plans developed by district courts for the disposition of criminal cases in accordance with the Speedy Trial Act shall be subject to review by panel consisting of members of the Judicial Council and the chief judge of the district or the chief judge's designate before submission to the AO.

18 U.S.C. sec 3174 - Judicial emergency and implementation. If a district court is unable to comply with statutory time limits of the Speedy Trial Act, the judicial council shall evaluate the situation and make recommendations to alleviate calendar congestion resulting from lack of resources. If the council finds no remedy is available, it may grant a suspension of the time limitations. Such action must be reported to the AO within 10 days.

Judicial vacancies (bankruptcy). Judicial Council will assist Court of Appeals by evaluating potential nominees to fill vacancies arising after the date of enactment of the 1984 Act (28 U.S.C. Sec. 152 note (section 102 of Pub.L 98-353, title I, July 10, 1984, amended by section 102 of Pub.L. 99-554, title I, October 22, 1986)).

28 U.S.C. sec. 1827(b) - Interpreters. The Judicial Council shall identify and evaluate the needs of districts for certified interpreters.

## APPENDIX C

### Judicial Conference and Administrative Office Delegations to the Judicial Council

- o Review and approve requests for new Article III judgeships for the Court of Appeals and district courts.
- o Review and approve requests for new bankruptcy judgeships and magistrate positions from the districts.
- o Approve modifications to the salaries of part-time magistrates.
- o Review and approve requests for additional (swing) court reporter positions.
- o Approve contract court reporter expenses
- o Approve court reporter management plans.
- o Review and approve requests for temporary emergency personnel.
- o Review and approve furniture purchases outside of design guidelines.
- o Approve space for courts outside of the design guidelines.
- o Approve staff and facilities for senior judges and recalled bankruptcy judges.
- o Allocate funds for facilities alteration projects above \$5,000.
- o Approve telephone purchases of less than \$1,000.00.
- o Review district requests for changes to CJA rules.
- o Approve pre-trial services agencies in the districts.
- o Monitor cases under submission and matters under advisement for all judicial officers.
- o Monitor 3-year-old cases of district judges.
- o Review financial audits regarding the courts of the circuit.
- o Approve Equal Employment Opportunity Plans from the courts of the district.

- o Assist bankruptcy courts with the implementation of the National Interim Bankruptcy Computer System (NIBS).

Distributing  
Administrative  
Responsibility

**DISTRIBUTING ADMINISTRATIVE RESPONSIBILITY  
WITHIN THE FEDERAL COURT SYSTEM**

**Submitted by**

**Steven Flanders  
Circuit Executive  
Second Circuit Judicial Council\***

**Summary**

This paper addresses the relationship of the federal courts to the Judicial Conference of the United States, the Administrative Office of the United States Courts and the Federal Judicial Center. The paper examines and comments on the distribution of administrative responsibilities within the federal court system.

The paper notes that a major effort has been made in recent years to decentralize the administrative decision-making process in the federal judiciary which previously had been concentrated almost entirely in the Judicial Conference and the Administrative Office. Decentralization has been accomplished by the establishment of a more powerful and democratic committee structure in the Judicial Conference and by the expanded involvement of the judicial councils and the individual courts in decision-making at the local level.

The perceived problems of the existing administrative structure can be divided into two major categories. The first category pertains to the role of the Administrative Office and includes the following: 1) the view of some, but certainly not all administrators in the field, that the size of the Administrative Office is excessive versus the Director of the Administrative Office's belief, shared by almost all other AO personnel, that the AO suffers more than the courts do from the current restrictive budgetary climate; 2) the perceived perception of field administrators that the Administrative Office staff believe they serve as a headquarters to the field offices rather than maintaining a service oriented relationship with the courts; 3) the lack of familiarity by Administrative Office staff with court operations; 4) the use of consultants by the Administrative Office without the involvement of field administrators in the process; and 5) the emergence of an us-versus-them mentality between the Administrative Office and the courts.

The second category is broader in scope and includes the following national policy issues: 1) which types of administrative decisions should be made at the national level and which decisions can be

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\*The summary and recommendations noted herein were taken from both the paper submitted by Steve Flanders and comments received independently from several other circuit executives.

decentralized to the judicial councils and individual courts; 2) the lack of long range and strategic planning and which body should undertake this project; 3) lack of initiative on the national level for establishing policy positions on judicial management issues; and 4) the lack of representation on Judicial Conference Committees of circuit executives, clerks of court and specialized senior Administrative Office staff.

#### **Recommendations**

The following solutions have been proposed: 1) decentralization of financial responsibility to provide more flexibility to the courts; 2) more delegation of decision making authority to judicial councils; 3) long range and strategic planning at the Administrative Office and the judicial council level; and 4) inviting field office personnel to comment on Administrative Office recommendations prior to the submission of those recommendations to Judicial Conference Committees.

#### **Comments**

The issue of the distribution of administrative authority and responsibility in the federal judiciary is an extremely important one and one which we believe deserves the attention of the Federal Courts Study Committee. Perhaps the committee should propose further study in this area and encourage pilot projects similar to the budget decentralization project underway in five pilot courts. The committee might encourage pilot projects for decentralization of the personnel system, the automation system, space and facilities and expansion of the budget pilot. The Federal Courts Study Committee, we believe, should request the views of the Judicial Conference Committee on the Administrative Office.



DISTRIBUTING ADMINISTRATIVE RESPONSIBILITY  
WITHIN THE FEDERAL COURT SYSTEM

This briefing paper addresses the relationship of the federal courts to their national administrative bodies. The Judicial Conference of the United States under 28 U.S.C. § 331 acts as the national governing body of the judiciary. Composed of the Chief Justice as chairman, the chief judge of each circuit and one elected district judge from each circuit (and two others), the Conference in some ways resembles a modest legislature, or board of directors. Its staff organ is the Administrative Office of the United States Courts, which also offers diverse system-wide services to the judiciary. The Federal Judicial Center, an independent research and training agency of the courts, is separately governed by an independent board. This briefing paper will trace changes in the distribution of administrative decision making between the courts and these bodies, and address present problems and perceptions thereof. A central thrust below is to support recent initiatives for changes; only modest changes in structure or operation are proposed.

The modern history of the federal court administrative establishment begins with the Administrative Office Act of 1939. Prior to that time the federal judiciary was administered by the Department of Justice, an Executive Branch agency. Since the Department of Justice is by far the largest litigant in federal courts, this administrative arrangement constituted not only a theoretical anomaly but also an occasional source of specific

embarrassment. Sometimes the judiciary was forced to route its requests for resources through the Department, and through such crucial individuals as the Attorney General, at times when the Department and its prominent representatives appeared in court in litigation.

Resolving this anomaly was one of the two great thrusts of the 1939 Act; the second was creation of a decentralized administration through the judicial councils (see briefing paper on this subject). As between these two legislative purposes, the Act seems to have been entirely successful in accomplishing the first but less so with the second. There appears to be no sentiment to restore any semblance of the old relationship to the Department of Justice, and it appears that no such sentiment has been expressed at any time by commentators or participants in the system. But the effort to establish a decentralized structure has met with mixed success at best; not surprisingly, there has been a continuing push and pull between the center and the "periphery"--the courts--as questions or disputes arise concerning the proper locus of decisions concerning administration of the courts.

The apparatus inherited by the Judiciary from the Department of Justice was a substantial one, and it has experienced much less growth since creation of the A.O. than has the Judiciary as a whole. Already in 1940 the Administrative Office staff numbered 77 persons, and by 1941, when some transitional vacancies were filled, the number was 91. In

addition to this, the Department of Justice retained a substantial corps of auditors, to discharge a function that was not moved to the Judicial Branch until about 1974. We thereby should regard the Administrative Office as having an actual initial staff of at least 100, probably much more, compared to its current strength of about 575. By contrast with this five-fold growth or thereabouts, judicial caseload in the system has increased by a factor of eight in the district courts since 1939, and a factor of eleven in courts of appeals.

The early years of the new arrangements appear to have been remarkably successful. In 1950 the first Director of the Administrative Office, Henry P. Chandler, was able to describe the first decade of the operation of the system, including the work of the Judicial Conference and its committees and of the judicial councils, with considerable and apparently justified satisfaction. Emphasis was placed upon the representative character of Judicial Conference committees, which Mr. Chandler credited to Chief Justice Hughes, but also to his successors, Chief Justices Stone and Vinson. As Mr. Chandler noted, "the double advantage [is] that the Judicial Conference receives the benefit of the opinions of judges throughout the country, and the judges who serve on the committees gain a perspective of the Federal judicial administration as a whole." (1950 Director's Annual Report, p. 65) Satisfaction seems to have been general with the national organs until after 1960.

As noted in the briefing paper on judicial councils, however, there has been persistent and continuing unease that these invisible bodies may not be fully discharging their responsibilities, or sustaining or even exercising the decentralized power granted to them by Congress. Reevaluations and reassertions of the judicial council powers were undertaken by the Judicial Conference of the United States in 1960 and in 1974. In a Forward to the first of these, in its transmittal by the House Judiciary Committee, Congressman Emanuel Celler emphasized his recollections from the drafting of the 1939 Act, saying "I know it was the intention of the Congress to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an administrative character to maintain efficiency and public confidence in the administration of justice."

The most important structural change in the judiciary's national organization came with the creation in 1967 of the Federal Judicial Center (28 U.S.C. §§ 620-629). A research and training agency of the federal courts, the Center undertakes technical development and evaluation programs in service of its mandate "to further the development and adoption of improved judicial administration. . . ." It inherited from prior projects of the Judicial Conference of the United States one of its most important core functions: training of judges, especially newly appointed judges. The former Committee on Pretrial Procedure had originated these programs and defined much of their content and

thrust; the Center continued them along a largely consistent course. Under its five successive directors, beginning when Justice Tom C. Clark (Ret.) assumed this office and organized the Center in 1968 and after, the Judicial Center has undertaken much of the long range and programmatic responsibility of the Judicial Branch.

There have been a series of successive revisions of the committee system of the Judicial Conference of the United States, including most recently a major rethinking of this structure in 1987. Like its predecessors, this one followed the initiative of a new Chief Justice of the United States. An especially welcome effort, the 1987 report of the Committee to Study the Judicial Conference reaffirmed the representative character of the Judicial Conference and its committees. The Committee stated at page 20 of its report, "An extensive Conference committee system is important to allow the Conference to complete its work in an efficient and effective manner. It is also important because it involves many judges with different viewpoints from across the nation and thus ameliorates the adverse impact of the Conference's national authority on the judiciary's traditions of regionalism and independence." Of special importance in the report is its recommendation of the revitalized Executive Committee that now can speak and act for the judiciary at any time.



### Present Status

The Judicial Conference of the United States meets twice a year, generally in March and September. The Executive Committee meets more often, both in person and by conference call. The 24 committees generally meet approximately in June and December, with occasional additional meetings (most often of subcommittees) as they prove necessary. Judicial Conference committees are staffed by senior Administrative Office personnel, and occasionally by staff of the Federal Judicial Center as well, when matters of a more long range character or necessitating a long-term research project are on the agenda of a particular committee.

The Administrative Office itself is the one national operational body of a continuing character, since the Judicial Conference and its committees of necessity are quite episodic in their impact. Judges and other committee members (even those on the Executive Committee) are not in a position to subordinate their prime responsibilities in their courts to the Judicial Conference, except briefly and at intervals. In a very thorough statement (March 9, 1989) of the mission and activity of the Administrative Office, Director L. Ralph Mecham described to a Subcommittee to the House Judiciary Committee an astonishing range of organs and assignments of each branch and division of the A.O.

A major effort has been made in recent years to distribute more widely the concentrated administrative power that



has been drawn to the Judicial Conference and the Administrative Office. The democraticized committee structure already noted is an important part of this. Former Executive Committee Chairman and Second Circuit Chief Judge Wilfred Feinberg observed at an October 1988 conference of all federal appeals judges that "What the committees do is not secret, and the members are not encouraged to be secretive." There has been a palpable increase in the representative relationship of each member to the courts.

Another change is a renewed habit of the Judicial Conference and Administrative Office to rely upon the judicial councils and the individual courts for hard decisions and choices of a local character, and to solicit their advice in matters of policy. Indeed, the matter of advice has proceeded so far that judges and staff often complain that they are asked to offer their advice on policy matters too often, sometimes on subjects to which they can make no more than a marginal contribution.

#### Perceived Problems

A bloated bureaucracy? It is a widely held view, or instinct, throughout the courts that the Administrative Office is excessive in its sheer size. In the 1989 Statement already referred to, Mr. Mecham makes clear that Administrative Office staffing has not kept pace with the growth of the judiciary. Mr. Mecham has made a very strong case that the AO suffers even more than the courts do from the current restrictive budgetary

climate. As new responsibilities have been assigned to the A.O. its growth is less even than proportional to the growth of the judiciary.

The headquarters? Of greater import is the tendency of A.O. staff to see their responsibilities by analogy with other Washington agencies that have more truly a headquarters relationship to their field offices. This misperception is supported by the difficulty the A.O. experiences in recruiting from the courts. Since many senior personnel grew up professionally in a headquarters office, the Director has an uphill battle as he attempts to reorient their thinking to a mode more appropriate to a service organization in a system in which power is widely dispersed.

Is the national level the wrong locus for administrative decisions? Not only the courts but also the Administrative Office increasingly believe that there are many administrative choices that cannot well be made for the whole country or solely in Washington. We are in a period of searching reexamination on this point. Considerations that suggest that a single national choice should or must be made include the following:

- Issues that entail uniform implementation of national law that has been imposed by statute or by rule.
- Issues that Congress addresses as policy matter (especially through the appropriations process) for which the judiciary is responsible to Congress for a unified account of its actions and performance.

- Issues for which the judiciary must devise a national policy to transmit to the Executive Branch or Congress.

Considerations that suggest decentralized action, by the judicial councils or by the courts, include:

- Choices that flow from local and diverse practices, such as special personnel assignments.
- Setting priorities or choices between competing projects or activities of different courts, such as competing construction projects.
- Choices between alternative priorities within a particular court. When resources are short, local choices are especially appropriate.
- Activities that are well distributed to the courts for reason of administrative convenience, or because the courts are better able than the A.O. to obtain staff resources (processing vouchers under the Criminal Justice Act, etc.).

It might be helpful for the Federal Courts Study Committee to undertake an evaluation of the present and prospective locus of each type of administrative function in the system.

Lack of staff familiarity with the courts. There really are two dimensions to the common view among judges and judicial staff that the Administrative Office staff is not well suited to act on matters that govern the courts. One is the capacity of AO staff as individuals to learn from experience in courts, and the other is their familiarity or lack thereof with court operations. At this time we seem to experience rather steady improvements in the former, but are losing ground on the latter. The quality of recent Administrative Office appointments

has been high, especially at the senior levels, but the opportunities of important Administrative Office personnel (at operational as well as policy-making levels) to gain first-hand experience with actual court operations are very limited now. Except in the Probation Division, the Administrative Office has very few persons with court experience. Recent limitations on travel funds, and perhaps a kind of preemption of those funds by automation projects (as well as Judicial Conference travel), has reduced drastically the opportunities of AO staff to work with court operations first hand. The several suggestions that have been raised over the years for AO and court personnel to exchange positions periodically have not proven practical. The effort remains worth exploring.

Lack of Long Range Planning. Some believe that statutory creation of the Federal Courts Study Committee constitutes an implied rebuke to the federal judiciary, reflecting perception in Congress that the judiciary does not know where it is going because it has no long range planning capacity. But creating this is not simple. Strategic planning of the sort practiced in corporations, for example, would not be meaningful in the judiciary. A planning body must have access to a power to implement a plan, such as a CEO or Board that can make strategic choices. Since the judiciary cannot control the demands upon it, or emphasize or drop what might be described as its "product lines" or lines of business, and has only marginal control over the resources devoted to those lines of business, a

long range planning capability of the usual variety would not be right, and might speedily become an empty exercise. In any case, creating a new national body for planning would only further multiply the complexity of a complex national structure. More promising might be to extend the new A.O. Office of Planning and Evaluation, or perhaps the Federal Judicial Center might seem the proper locus for any new effort here. Perhaps a new organ within the A.O. or Center could be established to manage new projects that flow from the work of the Federal Courts Study Committee. Judicial Conference committees could be encouraged to look to the long term

Does the judicial branch lack policy direction? There have been fitful efforts in the past to use the Judicial Conference, the A.O., and the F.J.C. as a "bully pulpit" to inspire (not direct) improvements in the performance of the judicial branch. The former Division of Procedural Studies and Statistics, under Will Shafroth and Statistics Committee Chairman Charles Clark (2nd Circuit) regularly suggested procedural improvements based on judicial statistics (Judge Clark had special opportunities here because he served also on the Advisory Committee on Civil Rules). Chief Judge Alfred P. Murrah in the 1960's and 1970's used the Committee on Pretrial Procedure and the FJC to exhort judges to solve the problems of the litigative process through active judicial management. In its early years, the FJC Board adopted several policy positions. Apart from occasional (necessarily infrequent) personal initiatives of the



Chief Justice, no one now takes initiatives of this sort at the national level. It seems that the present effort, conducted episodically at periods of every 10 or 20 years, may constitute the best solution here. The Federal Courts Study Committee, more than any other agency of the judicial branch, has a potential to produce plans that can be implemented.

Loss of policy control to consultants. In light of statutory responsibilities of the Federal Judicial Center, the recent inclination of the Judicial Branch to turn to outside contractors for policy evaluation when the interesting or important questions arise is surprising. For example, one wonders why it has proven necessary to hire an outside body on the important question of the judiciary's institutional relationship to the Executive Branch on matters of space and facilities. Similarly, it is surprising that the judiciary goes outside for evaluations of its own programs for decentralization of the budget, or for its judicial salary plan.

Are Judicial Conference bodies insufficiently representative and responsive? As noted already, this is a perception that has been recently addressed. It may be premature for the judiciary to take on yet again this issue so soon after a major reevaluation of the committee structure and mechanism. But significant unfinished business here may be the lack of judicial branch staff or administrators on Conference committees. Circuit Executives and clerks could contribute a great deal to such committees as Space and Facilities or Judicial Resources. More



specialized senior staff could make a distinct contribution to committees within their area of responsibility; chief probation officers, for example, could contribute very much to the Committee on Probation.

Staff responsibility could also be distributed to the "field" staff of the judiciary. There seems no necessary reason for the entire work of the Judicial Conference Secretariat to be done by Washington staff.

### Proposed Solutions

Decentralization. Major projects are under way to explore the feasibility of distributing financial responsibility more widely, providing flexibility to the courts among alternative expenditures. This is intended to help the judiciary learn to do more with less. No modifications of the programs is suggested here, because there is considerable experience being gathered already, especially by the National Academy of Public Administration for the Committee on the Budget. The experiments and initiatives here are parallel to numerous decentralization efforts under way in the Executive Branch and other organizations.

Delegations to the judicial councils. As already noted also, Congress, the Judicial Conference of the United States, and the Administrative Office, have delegated to the judicial councils dozens of programs, choices, and policy opportunities. This is an important structural fact and structural modification of recent years, in the Judicial Branch. But more can be done.

The foregoing suggests that the Judicial Branch has today a much strengthened national administrative structure, with a heightened sensitivity to the difficulty of making national decisions that are right for all jurisdictions in a large and diverse country. A constant search is underway for the best locus for decision making in each decision area, and as new areas arise. The quality of the national staff is much higher than formerly. These developments are to be applauded and supported.

Steven Flanders, for the  
circuit executive liaison  
group to the Federal Courts  
Study Committee  
Circuit Executive, 2nd Circuit  
July 7, 1989  
Assisted by comments of  
numerous other circuit  
executives, and others

### Sources

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Forthcoming Federal Judicial Center collection of papers presented at the Appellate Judges' Conference, October 1988.

# Court Reporters

## **UNITED STATES COURT REPORTERS**

**Submitted by**

**Joe Belton  
President**

**United States Court Reporters Association**

### **Summary**

This paper presents several issues that are of concern to the United States Court Reporters Association. The first issue concerns the "perceived failure" of the courts to fully utilize the technological skills and capabilities of its court reporters, over 70% of whom use computers for reporting and transcribing court proceedings. The Association maintains that the traditional role of the court reporter can be greatly enhanced to include managing information routinely presented in the courtroom. The Association states that a system has recently been developed that will enable court reporters to build a separate electronic data file to contain information such as the names of jurors, the time of events, the names of parties, witnesses, attorneys and judges. The Association believes that the time has come for the courts and the Administrative Office to plan for the integration of court reporters and their computer technology into the mainstream of court automation.

Secondly, the Association is concerned with the manner in which the electronic sound recording program is allegedly being conducted by the Administrative Office and the lack of information regarding the actual cost of installing and operating electronic sound recording systems. The Court Reporters Act was amended in 1983 to permit each United States District Judge to choose the method by which court proceedings would be recorded in his or her courtroom. The Association claims that nominees for district court judgeships, new appointees, senior judges, and others are pressured by Administrative Office personnel or by clerks of court to use tape recorders rather than court reporters. The Administrative Office claims that electronic sound recording systems are satisfactory and are more cost-effective than court reporters. The Association asserts that they have been unable to validate these claims because they are unaware of any studies that document either the cost savings or the effectiveness of these systems.

In addition, the Association is worried about the recent Judicial Conference authorization for a two-year experiment with videotape as the sole means of making the record of court proceedings. The Association asserts that a similar experiment in Kentucky has exposed problems at the state appellate level. Because of this the Association feels that the district court experiment must include the use of videotapes at the federal appellate level in order for the experiment to be beneficial.

### **Recommendations**

The Association recommends that the Federal Courts Study Committee address the above-mentioned issues and that a study of the electronic sound recording system be conducted by an independent non-government agency. In addition, the Association requests that if the Committee appoints any Advisory Panels under the provisions of Section 104 (2)(d) of the Federal Courts Study Act, it appoint reporter representatives to those panels which deal with court reporting matters.

### **Comments**

The author of this paper is clearly concerned about the future role of court reporters in the federal court system. The tone of this paper reflects the apprehension many court reporters feel about their skills becoming obsolete. It is suggested that these concerns be transmitted to the Judicial Conference Committee on Judicial Improvements.



*United States Court Reporters Association*  
*(USCRA)*



JOE BELTON, President  
P.O. Box 50905  
Dallas, TX 75250  
(214) 749-0431

Judge Weis, Professor Lee, Ms. Motz.

I wish to thank you for all United States court reporters for this opportunity to appear before this distinguished panel of the Federal Courts Study Committee.

There are several problems and issues which we will present. All of them fit into one or more of the categories on the "Summary List of Issues the Study Committee May Wish to Consider."

The first problem concerns the failure of the courts to fully utilize the invaluable technological skills and capabilities of its court reporters, over 70% of whom use computers for reporting and transcribing court proceedings. All that computer equipment was purchased by and is maintained by the individual reporters, at no expense to the United States.

At the present time the reporters and their computer equipment are used only for reporting and transcribing proceedings. There are many other applications which can be tied in with this equipment, some of which are in use in several federal and state computer-integrated courtrooms.

All kinds of computer litigation support, including Lexis, Westlaw, ABA Net, the Sentencing Commission's Assistance Program, keyword indexing, global search of an entire data base, in addition to real time (or instantaneous translation and transcription of proceedings), are now available by using the reporters' computers.

Computerized reporting now makes it possible in a computer-integrated courtroom for the hearing impaired to fully participate in

the proceedings. With a monitor at counsel table or the witness stand, the hearing impaired person can read the "transcript" on the screen within seconds after the words are spoken.

In a computer-integrated courtroom, whenever an attorney cites a case, the judge can use Lexis, for example, to call up the full text of the case right on the bench, and also check the validity of the citation. Judge Roger Strand in Phoenix, AZ has a computer-integrated courtroom, and he takes full advantage of its capabilities.

Computer-literate attorneys can bring all their deposition discovery into the courtroom in computerized format and have it loaded on the reporter's computer data base so that it's available to compare to the testimony as it unfolds.

At the end of a proceeding or a court day, an attorney can request the reporter for a floppy disk in ASCII (or non-generic) format. Back at the attorney's office, that disk can be inserted in his personal PC, so that he has, in effect, an immediate daily transcript. Using that disk, he can search the entire proceeding in seconds for the information he needs for cross-examination, oral argument, or any other purpose. In doing so, he has saved the cost of a daily typewritten transcript. He can obtain a certified copy of the transcript later, if it becomes necessary.

The proceedings could also be telecommunicated to the Circuit Court of Appeals on an ASCII disk, so that in an emergency the Circuit Court would have immediate access via its computers to the motions of counsel, trial court rulings, or the testimony of witnesses.

Also, as a routine matter, trial transcripts in ASCII format can be furnished to the Court of Appeals as part of the appellate record for computer-aided research by the law clerks.

The Judiciary Budget for 1990 includes an item showing proposed total expenditures for fiscal 1990 of over \$71,000,000 for court automation support. Despite this huge investment in automation, there is still a Missing Link in court automation. What is needed is a technique to increase the efficiency and accuracy of data collection while simultaneously reducing redundancy and costs.

Jere With, past president of the National Shorthand Reporters Association, is the founder of a concept called CADI, an acronym for "Courtroom Administrative Data Input." This is a system compatible with computer-aided technology that will enable court reporters to build a separate electronic data file of administrative features of courtroom work. For example, the names of jurors, the time of events, the names of parties, witnesses, attorneys, and judges are usually written manually by courtroom deputy clerks.

These data elements would be segregated from the reporter's regular shorthand outlines through electronic symbols, or "delineators," at the beginning and end of each data string. The court reporter at the end of each trial day, or any other interval, would simply strip out the administrative information so that a hard copy could be immediately printed, or the information could be electronically docketed on the clerk's docket by the court reporter from the court room, thereby reducing the workload of deputy clerks.

Statistical data collection efforts are usually superimposed on existing court staff, adding to their workload. CADI offers the potential of using existing court reporters, trained in the art of listening, to input data into data bases as the reporter makes the record for the trial court. Data analyses will, therefore, be made less time-consuming and thus reduce cost.

Included in the package of documents which I have provided is a concept paper on CADI [Exhibit A] prepared by the Court Administrator of the Court of Common Pleas of Stark County, Ohio. The National Center for State Courts and the National Shorthand Reporters Association are participating in this two-year experiment.

The computer revolution in the past decade was just a preamble to what is not yet on the horizon, but the preamble will soon be reality and an everyday routine in the next decade. Fortunately, the United States Courts already have in place a skilled cadre of Information Managers, its court reporters, who now have the necessary computer equipment to enable them to be an integral part of the entire court automation system -- today and on into the future!

However, so far there has been no attempt by the Courts or its administrators to integrate court reporters and their computer technology into the mainstream of court automation. We think this is an unfortunate oversight which needs to be addressed by the Federal Courts Study Committee.

Next we would like to mention two problems which we believe merit serious consideration by Committee: First, how the electronic sound recording (ESR) program is being conducted by the Administrative Office; and, second, the need to know the real total cost of the installation and operation of electronic sound recording systems in the United States Courts.

The Court Reporters Act, 28 U.S.C. 753 [Exhibit H], was amended in 1983 to permit each United States District Judge to use the method of his or her choice to record court proceedings -- a court reporter, electronic sound recording, or any other approved method. And we respect the right of judges to use the method of their choice.

However, we have learned that nominees for district court judgeships, new appointees, senior judges, and others are pressured by Administrative Office personnel or by clerks of court to use tape recorders rather than court reporters. One newly-nominated judge told an USCRA representative that the clerk of court had advised him that unless he opted for a tape recorder, he would not be permitted to hold court in the city of his choice, rather than the headquarters city of his district.

Some judges say they are told, "Try it; you'll like it! Some have spoken of the "tremendous" pressure that is exerted on them to use tape recorders; others have said that they are using tape recorders because they want the "perks" that are thus available to them.

The 1990 Judiciary Budget in Brief states on page 27: "The continued expansion of the program [electronic sound recording] eliminates the need to fill 24 existing court reporter positions that will become vacant during fiscal year 1989."

Although the 24 positions referred to may represent the yearly average number of reporters who retire, resign or leave the system for other reasons, what is troublesome is the approach taken by some Administrative Office personnel; that is, that whenever a vacancy occurs, that position is to be filled by a tape recorder. This is obviously without regard to the desires of the judge or judges involved. Clearly, when Congress amended Sec. 753, it did not intend that all court reporters should or would be replaced by tape recorders or some other system. However, to us, that is obviously the goal of some Administrative Office people.

There is a long-standing Judicial Conference policy that there is to be one reporter for one judge. We do not seek to have that policy



changed by asking for additional reporter positions. We endorse that policy, but respectfully suggest that each judge, without the slightest "gentle persuasion," should be able to exercise his or her statutory right to use the reporting method of his or her choice.

A related issue is how well ESR systems are doing in the District Courts. To the best of its ability, USCRA has been monitoring the use of ESR. We have received many reports of equipment malfunctions, transcripts which are not usable, transcripts full of (indiscernible) or (inaudible); inability to have testimony played back, and other problems.

The Administrative Office and various Clerks of Court, however, ignore these problems and continue to assert that ESR is completely satisfactory, and that ESR is more cost-effective than court reporters. However, when USCRA and its members try to obtain information about ESR problems from clerks of court or their deputies, a veil of secrecy descends, which is permeated only by silence.

We have documented many reports of malfunctions, bad transcripts, etc. Two specific instances are contained in the packet before you. One is a letter from Assistant U. S. Attorney Michael Reap, in St. Louis, MO [Exhibit B] to the 8th Circuit Court of Appeals, complaining about omissions and inaccuracies.

The next is from the Administrative Office to Sturman's Transcribing Service in New Jersey [Exhibit C], in which the transcribing contract of the firm was ended because of 631 notations of "indiscernible" on 160 pages of transcript.

The Federal judiciary and the Congress need to know the facts about how well ESR systems are or are not doing. The facts will only be revealed, we believe, as a result of a study conducted by an



independent non-government agency. We urge you to recommend such a study.

The second issue relating to ESR systems which we believe should be examined by the Committee is the claim by the Administrative Office that it is more cost-effective to use ESR than court reporters. So far as we have been able to ascertain, no comprehensive study of the cost of ESR systems in the United States District Courts has been conducted by the Federal Judicial Center, the Administrative Office, or any other government agency. We believe that an independent investigation of the true total cost of the installation and operation of electronic sound recording systems in the United States Courts is necessary so that the federal judiciary and the Congress will know the facts before making further commitments to the use of ESR. We also urge you to recommend such an investigation.

Last year the Judicial Conference authorized a two-year experiment with videotape as the sole means of making the record of court proceedings. The equipment to be used in the test is the same as that which has been used in some Kentucky state courts.

Although the experiment is not even under way, the proponents of videotape are claiming that it, too, is superior to reporters and is more cost-effective.

A major problem encountered in Kentucky will never be disclosed in the District Court experiment unless this Committee or Congress suggests or directs that appellate court use of videotapes must be an integral part of the experiment. In Kentucky the appellate courts have experienced problems in terms of the additional time (and thus expense) which must be expended by appellate judges and their staff in reviewing videotapes as compared with typewritten transcripts from court report-

ers.

There are many other problems with videotape, as was discovered by 6th Circuit United States Court of Appeals Judge Gilbert S. Merritt when he had to review a habeas petition arising from a Kentucky conviction. A copy of his letter [Exhibit D] outlining his concerns is also in the packet of documents. (Exhibit D-1 is a copy of pages 1, 2 and 3 of Judge Merritt's April 10, 1989 opinion in Dorsey vs. Parke, 6th CCA No. 88-5792, in which he discusses problems with videotape.)

Judge Merritt writes that the videotape was marginally audible at times, particularly when the trial judge and the attorneys whispered their sidebar conferences, and whenever two or more participants spoke at once.

He said that merely technical deficiency was dwarfed by the problem posed by the lack of an official written transcript. Because of the lack of a written transcript, he said that the parties could not engage with the bench in resolving simple factual questions about what happened at trial, and that oral argument about the events of the trial became, at times, an exercise in futility.

Not all the judiciary in Kentucky is enthralled with video. Judge Charles B. Lester of the 6th Appellate District Court of Appeals wrote in a January 9, 1989 letter [Exhibit E], also found in your packet:

"More often than not, the quality of both the video and audio is extremely poor and in many instances, especially bench conferences, the audio is nonexistent."

Judge Lester also shares our concern about cost when he writes:

"No one has done a cost accounting of the time consumed and the value thereof for reviewing these tapes and attempting to formulate the questions on appeal in the supporting briefs."

The Office of the Kentucky Attorney General writes in a letter

dated February 16, 1989 [Exhibit F], also contained in your packet:

"...reviewing a videotaped trial consumes an inordinate amount of time. An attorney must listen to the entire tape and replay those portions relevant to the issues briefed in order to take notes....The time factor of videotapes is of great concern to the state due to the budgetary restrictions in hiring additional attorneys. When an attorney is assigned a videotaped case, his caseload must be decreased."

As a footnote to Judge Merritt's remarks, I invite your attention to an interesting decision of the Florida Supreme Court [Exhibit G]. In an opinion written by Justice Rosemary Barkett in Ciccarelli vs. State, 508 So.2d 52, at 53, released in September 1988, the Court said that while the initial decision of whether error occurred may be made from a fragment of the record, "the effect of the error on the verdict is a different inquiry. It must, in most cases, be evaluated through the examination of the entire trial transcript." And with videotaped proceedings, that would, of course, mean untold extra hours of review time by the appellate court.

Just a few years ago the sound recording experiment in 12 district courts, with preordained results, was evaluated by its main advocates. This time the videotape experiment is to be again evaluated by its proponents.

We believe that the interests of the judiciary and the Congress would be best served if this Committee recommended that all such experiments be evaluated by outside, independent agencies.

The continuing effort to replace court reporters with electronic sound recording or videotape systems has had a demoralizing effect on court reporters. More important, it is one of the major reasons that

it is very difficult to recruit and retain reporters for service in the United States District Courts.

The issue of electronic sound recording in the United States District Courts needs to be thoroughly re-examined. We hope that the Committee will consider this to be a serious problem, as we do, and will recommend appropriate action.

The United States Courts require the most accurate and reliable transcripts at the lowest possible cost to litigants and the court. We believe that the use of highly skilled, technologically-oriented court reporters will provide the needed results.

In conclusion, we would respectfully request that if the Committee appoints any Advisory Panels under the provisions of Section 104 (2) (d) of the Federal Courts Study Act, it will appoint reporter representatives to those panels which deal with court reporting matters.

Thank you for the privilege of making this presentation.

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(Index of Exhibits and Exhibits Follow.)

March 31, 1989

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**CADI (COURTROOM ADMINISTRATIVE DATA INPUT):  
THE MISSING LINK IN COURT AUTOMATION**

**A Concept Paper Submitted For Consideration By**

**F. Dale Kasperek, Jr.,**

**Court Administrator**

**On Behalf Of**

**The Judges of the Court of Common Pleas**

**Stark County Courthouse  
115 Central Plaza North  
Canton, Ohio  
44702  
(216) 438-0707**



### DEMOGRAPHICS

Stark County, Ohio is located in Northeastern Ohio approximately forty-five miles south of Cleveland and fifteen miles south of Akron. The county seat is Canton, Ohio, renowned for the Pro Football Hall of Fame. The county is the eighth largest in Ohio having a population of approximately 373,790.

The Court of Common Pleas of Stark County is a trial court of general and specialized jurisdiction having seven judges serving three divisions: the General Division (felonies and civil over \$10,000), the Family Division (domestic relations and juvenile), and the Probate Division (decendent estates, will contests, mental illness proceedings, etc.).

### SPECIAL INTERESTS AND INTRODUCTION

The primary "Special Interest" category for this concept paper is "application of technology". Secondary special interest categories of "the future and the courts" and "reduction of litigation expense and delay" also apply to this project.

The Court of Common Pleas has chosen trained, professional reporters to make the record utilizing CAT equipment. It is the goal of this project to more efficiently utilize professional reporters and CAT equipment integrating their function in the court process by making reporters information managers or information brokers.

Quoting from David Saari's recent book:

...a committee of NSRA developed a system compatible with CAT technology that would enable court reporters to build a separate file of data inputs about administrative features of courtroom work. For example, the names of jurors, the time of events in the courtroom, the names of parties, witnesses, attorneys, and judges are usually hand transcribed by courtroom staffs. A court reporter could simply build a small separate electronic file and at the end of each day of trial or any other interval, strip out the administrative information. This prototype system is in the developmental stages but has great potential for recasting data flows inside the courtroom, and among courtrooms and administrative support offices in a court system.<sup>1</sup>

The acronym given to this concept is CADI or Courtroom Administrative Data Input. The time has come to apply this construct to a trial court.

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<sup>1</sup> David J. Saari, The Court and Free Lance Reporter Profession: Improved Management Strategies (New York: Quorum Books, 1988), 127.

## NEED

Simply put, the need for such a technique is to increase the efficiency and accuracy of data collection in our courts while simultaneously reducing redundancy and costs.

All too frequently, data collection efforts are nonexistent. More frequently, they have been superimposed on existing staff, adding to their workload, or have caused the addition of staff. CADI offers the potential of utilizing existing personnel, trained in the art of listening, to input data into case tracking databases as the reporter makes the record for the trial court. Data analyses, such as those conducted by the National Center for State Courts in On Trial: The Length of Civil and Criminal Trials<sup>2</sup>, will be made possible. As a result, we will have the tools to measure and analyze our court's performance and compare it to others.

Furthermore, court documents such as trial notices could be generated through key strokes made by a reporter in pretrial. In the courtroom, counsel and the Judge could review calendars and select a trial date. The reporter could steno stroke this information into the computer and the trial date entry would be printed on a laser printer in the courtroom. The Judge would sign the entry and hand it to counsel while they were present in the courtroom. This would eliminate the need for other court room staff to manually make note of the information and pass it

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<sup>2</sup> Dale Anne Sipes, On Trial: The Length of Civil and Criminal Trials (Williamsburg, Va.: National Center for State Courts, 1988).

to other staff who enter it into the computer to generate trial notice or other entries. This process would save postage. In addition, handing notices to counsel in the presence of the Judge may eliminate the interminable excuse, "I didn't receive notice". Entries such as these could be electronically docketed on the Clerk's docket by the court reporter from the courtroom, thereby reducing the workload of deputy clerks. These are but a few examples of what CADI could offer the trial courts.

### APPROACH

It is our contention that the Court of Common Pleas of Stark County, Ohio, is the prime location for a pilot project to link court processes through CADI. First, this Court has continually demonstrated interest and support for professional court administration. Second, the Court recognized the need to manage court reporting resources "pooling" official reporters under the direction of a managing reporter. Third, the Court established minimum standards for employing new reporters, including educational requirements, experience, and RPR certification. Fourth, the Court embarked upon a comprehensive automation project crossing divisional lines.

We now have a modern information system on a mini computer located in the Administrative Office. Twenty-eight workstations are currently on line serving the three divisions of the court.

In 1987, we purchased CAT equipment and software. The Ohio Shorthand Reporters Association (OSRA) has designated our

court to be the second pilot site in Ohio for implementation of the Computer Integrated Courtroom (CIC). The president of the OSRA has appointed a five member committee to work with our court reporters, administrator, judges and Bar Association to implement this project.

As David Saari stated, CADI prototypes are in the development stages. It is the objective of this project to bring together the National Shorthand Reporters Association, the Ohio Shorthand Reporters Association, BaronData, our court reporters, a fourth generation software expert, and others to develop and implement CADI in the trial court setting.

#### EVALUATION

The goal is to have an independent evaluation. For this reason, no measures for evaluation are proposed by the author. Instead, the author has requested in writing that evaluation measures be developed and conducted by a team from the National Center for State Courts, Northeastern Regional Office. The Northeastern Regional Office is familiar with the Court of Common Pleas having performed a survey on case processing in April of 1987.<sup>3</sup> The details of the evaluation proposal are included as an attachment.

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<sup>3</sup> William E. Hewitt and David W. Orrick, Case Processing in the Stark County (OH) Court of Common Pleas (North Andover, Mass.: Northeastern Regional Office of the National Center for State Courts, April, 1987). OJA-NJI 84-SN-AX-0001.

## PRODUCTS AND BENEFITS

The product of this effort would be a new generation of trial court automated systems, fully integrated, with improved methods of data capture. The benefit is the transferability of the system due to the approach, the participants and the technology. We are using a fourth generation application generator known as "PDS-ADEPT", a licensed product of Parameter Driven Software, Inc. (PDS). A fourth generation development tool saves programmer time in developing applications and generating reports. Also, programs designed for one jurisdiction may be easily modified by the end user in another jurisdiction as long as they are licensed PDS-ADEPT users. Assuring transportability, PDS-ADEPT runs under different operating systems; MSDOS/PCDOS, BTOS/CTOS and various levels of UNIX. Small, medium, and large courts could benefit from this development. Programs developed here could be "transferred" in the public domain to other jurisdictions in Ohio or other states as long as they were licensed users of PDS-ADEPT (priced competitively with over the counter data base software). One of the objectives we have kept in mind is transferability. Since the development team consists of OSRA and NSRA, we are assured that the reporting methods developed will be conducive to implementation by other reporters statewide and nationally. Given our decisions, we believe that what we are doing could be readily adapted by any jurisdiction choosing to do so.



## KEY STAFF

## STARK COUNTY

F. Dale Kasperek, Jr., Court Administrator

Previous experience includes Deputy Court Administrator in the Court of Common Pleas of Allegheny County (Pittsburgh), Pennsylvania. Also served as the Judicial District Administrator of the Tenth Judicial District in Minnesota. Has served the Court of Common Pleas of Stark County as Court Administrator since September of 1981. Educational background includes numerous specialty courses such as those offered by ICM, the National Center for State Courts, and the National Judicial College, a B.A. in Criminology and a M.A. in Public Administration from the University of Pittsburgh.

## Court Reporters

Sylvia Smith, Managing Court Reporter  
Monica Bouchard, Assistant Court Reporter  
Alana Hill, Assistant Court Reporter  
Tina Masters, Assistant Court Reporter  
Andrea Welder, Assistant Court Reporter

Joe Ryan, Senior Systems Analyst

Previous experience includes Marketing and Sales with both Burroughs (UNISYS) and Wang Corporations. Mr. Ryan has served as a Senior Systems Analyst in the Data Processing Department for four years. Mr. Ryan has completed numerous computer specialty courses and has a B.A. in Business Administration from Kent State University in Ohio.

**NATIONAL SHORTHAND REPORTERS ASSOCIATION**  
**Jerry Miller, RPR, President, NSRA**

Has named Jere L. With, RPR and Past President of NSRA to lead the NSRA members of the development team (see enclosed letter).

**OHIO SHORTHAND REPORTERS ASSOCIATION**  
**Kathryn Keeler, RPR, President, OSRA**

Has named herself; Thomas F. Runfola, RPR; Bruce Matthews, RPR; Douglas Ackerman, RPR; Scott Gamertsfelder, RPR, and; Lisa Nagy-Baker, RPR to the OSRA development team (see enclosed letter).

**CONSULTANTS**

Others requested to join the design team are David Saari, Professor of Judicial Administration, American University and Ronald Staudt, Professor, Chicago-Kent College of Law, Chicago, Illinois.



Organized Crime Drug Enforcement  
Task Force - South Central Region

1114 Market Street, Room 421

314/339-6726

St. Louis, Missouri 63101

FTS: 362-6726

February 2, 1989

Michael E. Gans  
Chief Deputy  
U. S. Court of Appeals  
for the Eighth Circuit  
1114 Market Street  
St. Louis, Missouri 63101

Re: United States v. Daniele

Dear Mr. Gans:

In preparing our brief we have noticed what I believe are material omissions or at least one instance of an inaccuracy. In particular, it appears that major portions of events surrounding the voir dire and cautionary instructions given to the jury relating to defendants Donald Anton, Walter Klein, and Angelo Parato's guilty pleas and the severance of Aurora Anton are not in the transcript. After opening statements were made before the jury and alternates those defendants plead or were severed from Daniele's trial. One of the issues on appeal is whether or not the defendant's request for a mistrial after the guilty pleas etc. should have been granted. There also appears to be omissions from the transcript that relate to issues # 1, 2, and 3 of the defendant's brief.

As you know, Judge Hungate's trial transcripts are electronically recorded and ultimately transcribed. I have spoken to Joan Boswell the court reporter and she is going to check the recording. The other instances of omissions and inaccuracies have also been brought to her attention. At this time she is in trial, however, she has promised to check these matters as soon as possible.

Because of the apparent omissions and inaccuracies, we are asking the Court for an additional 14 days through February 22, 1989 to file the Government's brief. Thank you for your consideration of this request.

Very truly yours,

THOMAS E. DITTMEIER  
United States Attorney

*Michael W. Reap*

MICHAEL W. REAP  
Assistant United States Attorney

cc. Donald Wolff

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L. RALPH MEEHAN  
DIRECTOR

JAMES E. MACKLIN, JR.  
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

WASHINGTON, D.C. 20544

April 30, 1987

RAYMOND A. KARAM  
ASSISTANT DIRECTOR  
FOR ADMINISTRATION

Ms. Betty Sturman  
Sturman's Transcribing Service  
84 Fletcher Avenue  
Manasquan, New Jersey 08736

Dear Ms. Sturman:

It has just come to our attention, through the attached material, that your firm produced a transcript for the United States District Court for the District of Maryland on or about February 26, 1986, which contained over 631 notations of indiscernibles on 160 pages of transcript (U.S.A. vs. Barbara Ann Howard; Honorable Walter Black, presiding).

We have consistently requested that, in the event you were to receive deficient copy of a tape, you not produce the transcript. Rather, we asked you to return the order to the court with the evaluation form explaining why you could not provide a quality transcript. This procedure would maintain the integrity of the electronic sound recording program. Evidently, the court did not monitor the transcript produced upon its receipt.

It is with distinct regret that, because your firm has failed to control the quality of the transcripts, we must remove your firm's name from the list of transcription firms approved by the Administrative Office of the United States Courts.

If, when you receive this letter, you have any transcripts in preparation, please complete them. By copy of this letter, I am notifying the courts not to place any additional orders with your firm.

Regretfully,

*Rich McBride*

*for* Jon A. Leeth  
Special Assistant to the  
Assistant Director

cc: Clerk, U.S. District Court  
Clerks, U.S. Bankruptcy Courts

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

March 6, 1989

CHAMBERS OF  
GILBERT S. MERRITT  
CIRCUIT JUDGE  
SUITE 303 CUSTOMS HOUSE  
701 BROADWAY  
NASHVILLE, TENNESSEE 37203

Editor  
ABA Journal  
750 N. Lake Shore Drive  
Chicago, IL 60611

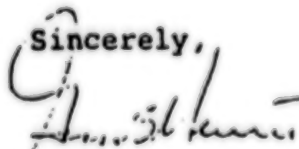
Dear Editor:

I have recently had a dismaying encounter with Kentucky's new audio-videotape method of recording trial proceedings, which you praise in your February issue ("Court Reporters On Way Out?", p. 28). Sitting on a panel of the Sixth Circuit Court of Appeals, I had to review a habeas petition arising from a Kentucky conviction, and found that the video "transcript" did not provide an adequate basis for review. First, the videotape was marginally-audible at times, particularly when the trial judge and the attorneys whispered their sidebar conferences and whenever two or more participants spoke at once. That merely technical deficiency is dwarfed, however, by the problem posed by the lack of an official written transcript. In order to analyze complex evidentiary rulings of the trial judge, I needed a stable, easily referenced record of the trial. In order to confer with the other judges on the panel about my analysis, I had to share that record with them. I, therefore, had to set my staff to the task of preparing a transcription -- a task we lack the equipment to perform with any ease.

The difficulties caused by the videotape transcript were not yet over. Though the judges had a single transcript, at oral argument it became clear that the parties had no similar document. The parties could not engage with the bench in resolving simple factual questions about what happened at trial. Oral argument about the events of the trial became, at times, an exercise in futility.

My experience with this case suggests that a rule like Michigan's -- that written transcripts must be provided when a case is appealed -- would preserve the significant savings offered by the videotape method without trammelling appellate review.

Sincerely,



Gilbert S. Merritt

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slp

RECOMMENDED FOR FULL TEXT PUBLICATION  
See, Sixth Circuit Rule 24

No. 88-5792

**UNITED STATES COURT OF APPEALS**  
FOR THE SIXTH CIRCUIT

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MICHAEL EDWARD DORSEY, <i>Petitioner-Appellee,</i>	} ON APPEAL from the United States District Court for the Western District of Kentucky.
v.	
AL C. PARKE, WARDEN, NORTHPOINT TRAINING CENTER, <i>Respondent-Appellant.</i>	

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Decided and Filed April 10, 1989

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Before: MERRITT and MILBURN, Circuit Judges; and  
LIVELY, Senior Circuit Judge.

MERRITT, Circuit Judge. This is an appeal from a District Court Order granting the writ of habeas corpus. The writ has been stayed pending appeal. The issue before us is whether petitioner Michael Edward Dorsey was denied his federal constitutional right to confront a key witness against him in his state trial for burglary. Because we conclude that Dorsey's constitutional right was not abrogated, we vacate the judgment below.

I.

Dorsey was convicted of second degree burglary by a jury verdict in the Jefferson Circuit Court of Kentucky. He then



pled guilty to being a persistent felony offender, and was sentenced on the two convictions to a term of 12 years. Dorsey pursued his appeal, without success, in Kentucky's Court of Appeals and Supreme Court. He then filed a petition for habeas corpus relief in federal court.

Dorsey had been arrested, along with his cousin Gerald Campbell, in connection with the burglary of a home. Campbell became a key witness against Dorsey, and the impeachment of his testimony was crucial to Dorsey's defense. The District Judge held that Dorsey's convictions were obtained in violation of his Sixth Amendment right to confront witnesses against him because Dorsey's attorney was not allowed to impeach Campbell's credibility by showing emotional instability, low level of mental functioning, and intellectual malleability—in short, by showing that Campbell lacked the intellectual and emotional stamina to resist police pressures to testify to Dorsey's guilt. Error was founded (1) on the trial judge's limitation of cross-examination of Campbell and (2) on her ruling that records of Campbell's therapy in a mental health facility were inadmissible as privileged.

The record is replete with difficulties, not the least of which being its presentation as a videotape. First, the videotape is marginally audible at times, particularly when the trial judge and the attorneys whispered their sidebar conferences and whenever two or more participants spoke at once. Second, we are not equipped to produce efficiently the written transcription on which careful review must be founded. Finally, the parties did not have our transcription—indeed, they seemed not to have *any* transcription—rendering oral argument about the events of the trial an exercise in futility. Though we note that Kentucky's experiment in videotaping trials is receiving praise in the press, "Court Reporters on Way Out?: Courts Experiment with Audio-Video Machines," *ABA Journal* 28 (Feb. 1989), we wish to call attention to the acute difficulties this innovation presents to courts attempting to fulfill their function of judicial review.

Fortunately, we are able to discern enough of the proceedings at Dorsey's trial to rule on his constitutional claim. The trial judge imposed limits on defense's cross-examination of two witnesses, Campbell and his attorney Sarah Wiler, but, since the District Court's ruling does not reach the limits placed on cross-examination of Wiler, we need consider only the cross-examination of Campbell.

Campbell was charged with the burglary but he was diverted to the youthful-offender program on the Commonwealth's condition that he testify against Dorsey. The burglary charges were eventually dismissed. Before the Dorsey trial Campbell was indicted on a second, unrelated robbery charge and was allowed to plead to a misdemeanor. All these facts except the guilty plea were elicited in testimony before the jury.

Dorsey's attorney then sought to show that Campbell's mental abilities were so shaky that he was particularly susceptible to police intimidation or suggestion. At this point the trial judge imposed limits on counsel's cross-examination of Campbell, prohibiting questions about Campbell's mental stability and particularly about a suicide attempt he made some time after promising to testify against Dorsey. Nevertheless, Dorsey's attorney was allowed to establish that Campbell had been treated at a mental health facility because of a suicide attempt made after he gave his statement implicating Dorsey to the police. The fact that this testimony came in despite the trial judge's earlier ruling that it would not be admitted moots any constitutional defect in that earlier ruling. The focus of defense counsel's cross-examination then shifted to medical records made by a mental health facility at which Campbell obtained treatment after his suicide attempt. The trial judge barred admission of these records on the grounds that they were privileged, and instructed Dorsey's attorney that she must limit further questioning about Campbell's mental stability to the circumstances in which he made his statement incriminating Dorsey. The defense



COMMONWEALTH OF KENTUCKY  
COURT OF APPEALS  
SIXTH APPELLATE DISTRICT

CHARLES E. LUSTER  
JUDGE, DIVISION ONE  
ONE MOORE ROAD  
WILSON, KENTUCKY 40391

(000) 281-0000

January 9, 1989

Ms. Jill Berman Wilson  
Wilson Levy & Associates  
85 Nassau Avenue  
Plainview, New York 11803

Dear Ms. Wilson:

Heretofore I had sent you a response from one of the Kentucky Appellate Public Defenders to an order to show cause why she should not be held in contempt for failure to file a brief in the allotted time. On the day set for hearing (February 7, 1989), she filed a similar response for another public defender in a like matter and it should be of interest to you so it is enclosed.

The Kentucky Court of Appeals consists of 14 members of which there currently exists a vacancy. At our recent monthly meeting, four members were absent, one of whom, Judge McDonald, was on the West Coast lecturing on the merits of video taped trials. Of those present, only the Chief Judge favored video taping and a lengthy discussion was held wherein certain facts and practices were mentioned. First of all, the delay that formerly existed between notice of appeal and preparation of the transcript has been eliminated but an even longer time lapse occurs when the authors of the briefs have to review the lengthy tapes in order to extract evidentiary material. No one has done a cost accounting of the time consumed and the value thereof for reviewing these tapes and attempting to formulate the questions on appeal in the supporting briefs. The next delay occurs when the reviewing judge(s) have to again review the tape, which is usually in its entirety, because many times counsel fail to place the counter numbers in the brief and again, oftentimes, they are inaccurate. As one judge put it, when he had only one staff attorney and typed transcripts, he could write 12 opinions a month and occasionally asked for one or two extra cases, but now, with two staff attorneys and video tapes, he finds it difficult to get those dozen opinions ready. Another judge commented that one of his staff attorneys utilized three entire days reviewing tapes while another mentioned five. All of these speakers indicated that the work is so much faster and accurate with typed transcripts.

FEBRUARY 9, 1989

More often than not, the quality of both the video and audio is extremely poor and in many instances, especially bench conferences, the audio is nonexistent. It was also mentioned that trial judges are both intentionally and unintentionally failing to engage the cameras in order to record the proceedings. This usually does not take place during testimony but at other varied points in the trial.

As far as any of our judges were aware only one member of our Supreme Court has personally reviewed a video tape in its entirety. I might add I spoke to one of the judges absent from our meeting and he expressed the hope that we would eliminate the procedure under discussion. It was interesting to learn that either the National or Kentucky Reporters Association furnished the Boyle County Circuit Court sitting in Danville, Kentucky, with a machine that turns out a computer type of transcript (printed) almost immediately at the time the court reporter enters the testimony.

I am still of the view that video is absolutely useless on appeal and has many faults, which in the appellate processes cannot be corrected. As an example, it is not our function to view the witnesses and their demeanor as that is the purpose of the trial judge while ours is to review a "cold" record. You may rest assured that contrary to what two of our colleagues may be saying in their travels to many states that the Kentucky Judiciary is not solidly behind video taping. Again, I must emphasize that we are slowly learning that the man hours involved have not been considered when the advocates of the system pointed how much cheaper it may be.

Wishing you every success in your endeavors, I am,

Very truly yours,



Charles B. Lester, Judge

CBL/lb

Enclosure



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

FREDERIC J. COWAN  
ATTORNEY GENERAL

February 16, 1988

CAPITOL BUILDING  
FRANKFORT 40601

Ms. Ann Leroy  
Ann/Dor Reporting Service  
179 East Maxwell Street  
Lexington, Kentucky 40508

Dear Ann:

In response to your inquiry regarding an appellate attorney's view of video tapes, I can emphatically state that they are a disaster.

First, the tapes are inaccurate as most of the comments made at the bench are inaudible. In our case we, the attorneys for the state, have no way to determine whether an objection by defense counsel was truly voiced. This problem is crucial as an appellate court seldom, if ever, reviews an issue not raised at the trial level. It is, therefore, most important that we ascertain if an objection was raised. If so, we are further handicapped as the ruling of the trial judge is lost.

Second, reviewing a video taped trial consumes an inordinate amount of time. An attorney must listen to the entire tape and replay those portions relevant to the issues briefed in order to take notes. I estimate that it takes me twice the amount of time to prepare a brief when the record is on video tape. With a transcript I can scan the record and focus on the evidence in question. The time factor of video tapes is of great concern to the state due to the budgetary restrictions in hiring additional attorneys. When an attorney is assigned a video taped case, his caseload must be decreased.

Third, federal courts will not accept video tapes; therefore, the ~~state~~ courts must provide transcripts. Again, this is extremely costly and time consuming.

Ms. Ann Leroy  
Page Two  
February 16, 1988

I wish you well in persuading the Kentucky Supreme Court to forego video taped records. I know a few of my colleagues have informed various justices of their dissatisfaction with the video tapes. However, the Court is adamantly committed to implementing video taped records statewide. For that reason, this office has not chosen to forcefully attack their use.

If I can be of further assistance, please contact me. I feel that this method of preserving a record is both faulty and impractical.

Sincerely,



Kay Winebrenner  
Assistant Attorney General

KW:sc



8—The Florida Bar News/October 1, 1988

## Appellate judges must examine transcripts for harmless error

In most instances, appellate judges must assume the burden of examining trial transcripts in their entirety to adequately determine the issue of harmless error, the Florida Supreme Court has ruled.

In an opinion written by Justice Rosemary Barkett and released September 8, the court remanded *Cicarelli v. State*, 508 So.2d 52, 53 (Fla. 4th DCA 1987) to the district court.

The high court vote was 7-0, with Justices Parker Lee McDonald and Leander Shaw concurring in result only.

At issue was whether, in evaluating an assertion of harmless error in a criminal appeal, each appellate judge must independently read the complete trial record.

The district court certified that question to the court after finding harmless error by the state in an appeal by Joseph Anthony Ciccarelli. The court conceded that it reached its decision without the benefit of each judge independently reading the entire court record.

CITING *State v. DiGuilio*, 491 So.2d 1250 (Fla. 1986), the Supreme Court said that if the state has presented a prima facie case of harmless error, the appellate court must evaluate the record to determine whether the trial result would have been the same absent the error.

"The examination of a record for the purpose of evaluating harmless error necessarily involves more than a resolution of contested facts," the court wrote.

"This requires more than a mere totaling of testimony, and, in most instances, more than a mere reading of a portion of the record in the abstract. It entails an evaluation of the impact of the erroneously admitted evidence in light of the overall strength of the case and the defenses asserted," the court said.

While the initial decision of whether error occurred may be made from a fragment of the record, "the effect of the error on the verdict is a different inquiry," the court said. "It must, in most cases, be evaluated through the examination of the entire trial transcript."

"THIS is not to say that every case will require a reading of every word in a trial transcript. We can envision certain errors,

such as improper leading questions or admission of totally irrelevant matters, that would not require such a demanding task. The decision of how much to read in order to apply the harmless error test 'rigorously' and appropriately must be left to the conscience of each individual judge," the court said.

"This is to say, however, that it is a responsibility that must be performed in the final analysis by each member of the panel of judges, not by the lawyers or the law clerks. . . Briefs, summaries and memoranda are a help, not a substitute. It is the judge who is qualified by experience and appointment who has the ultimate responsibility of the decision, and it cannot be delegated to law clerks, lawyers, or even other members of the panel."

## TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

### § 753. Reporters

(a) Each district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall appoint one or more court reporters.

The number of reporters shall be determined by the Judicial Conference of the United States.

The qualifications of such reporters shall be determined by standards formulated by the Judicial Conference. Each reporter shall take an oath faithfully to perform the duties of his office.

Each such court, with the approval of the Director of the Administrative Office of the United States Courts, may appoint additional reporters for temporary service not exceeding three months, when there is more reporting work in the district than can be performed promptly by the authorized number of reporters and the urgency is so great as to render it impracticable to obtain the approval of the Judicial Conference.

If any such court and the Judicial Conference are of the opinion that it is in the public interest that the duties of reporter should be combined with those of any other employee of the court, the Judicial Conference may authorize such a combination and fix the salary for the performance of the duties combined.

(b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge

of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

(d) The Judicial Conference shall prescribe records which shall be maintained and reports which shall be filed by the reporters. Such records shall be inspected and audited in the same manner as the records and accounts of clerks of the district courts, and may include records showing:

- (1) the quantity of transcripts prepared;
- (2) the fees charged and the fees collected for transcripts;
- (3) any expenses incurred by the reporters in connection with transcripts;
- (4) the amount of time the reporters are in attendance upon the courts for the purpose of recording proceedings; and
- (5) such other information as the Judicial Conference may require.

(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States. All supplies shall be furnished by the reporter at his own expense.

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U.S.C. 3006A), or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, shall be paid by the United States out of moneys appropriated for those purposes. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal. Fees for

transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

(g) If, upon the advice of the chief judge of any district court within the circuit, the judicial council of any circuit determines that the number of court reporters provided such district court pursuant to subsection (a) of this section is insufficient to meet temporary demands and needs and that the services of additional court reporters for such district court should be provided the judges of such district court (including the senior judges thereof when such senior judges are performing substantial judicial services for such court) on a contract basis, rather than by appointment of court reporters as otherwise provided in this section, and such judicial council notifies the Director of the Administrative Office, in writing, of such determination, the Director of the Administrative Office is authorized to and shall contract, without regard to section 3709 of the Revised Statutes of the United States, as amended (41 U.S.C. 5), with any suitable person, firm, association, or corporation for the providing of court reporters to serve such district court under such terms and conditions as the Director of the Administrative Office finds, after consultation with the chief judge of the district court, will best serve the needs of such district court.

# U.S. Marshals



# **UNITED STATES MARSHALS SERVICE**

**Submitted by**

**Stanley Morris  
United States Marshal**

## **Summary, Recommendations and Comments**

The Marshals Service submitted a letter to the Federal Courts Study Committee recommending issues for the committee to evaluate. A copy of the letter was sent to Ralph Mecham, Director of the Administrative Office of the United States Courts. Mr. Mecham's response to each of the issues addressed by the Marshals Service is incorporated in this synopsis.

### **1. Limit the Number of Court Sites to Reduce Security Risks**

The Marshals Service should review requests for places of holding court and make recommendations on building security, availability of jail space, and provide other necessary requirements such as work space for the Marshals Service. A policy may need to be established to regulate the number of court sites to ensure the security of judicial proceedings.

Mr. Mecham states that several court facilities could be abandoned without posing an unreasonable burden upon local attorneys and litigants. On several occasions attempts have been made by the Judiciary to close some of these facilities, however, the efforts have been met by solid opposition from local bar associations and civic authorities and from the local members of Congress. The political reality is that it has been almost impossible to shut down a place of holding court. Mr. Mecham believes that the Federal Courts Study Committee should address this issue but suggests waiting for a report which is being prepared by the Judicial Conference's Committee on Judicial Improvements.

### **2. Establish Alternative Methods to Produce Prisoners for Court Appearances**

In certain situations security risks can be eliminated by using closed-circuit television or tele-conferencing to substitute for a prisoner's physical presence in court. This equipment would enable jurors and judicial officers to communicate directly with material witnesses or other trial participants who are being held in nearby or distant detention facilities.

Mr. Mecham states that serious policy issues are raised by this proposal, and the Federal Rules of Criminal Procedure might have to be revised. Because the Judicial Improvements Committee is actively studying this issue, Mr. Mecham does not recommend that the Federal Courts Study Committee get involved at this point.

**3. Provide an Adequate Number of Court Security Officers Assigned to Each Courthouse**

The Marshals Service is responsible for ensuring the integrity of the Federal judicial system by establishing and maintaining security for 507 Federal judicial facilities nationwide. Due to inadequate staffing levels, the opening of new facilities, and the movement of court security officers to other more critical locations, there are 87 locations without court security officer coverage.

Mr. Meham states that the Judiciary has requested adequate resources for the security program, but the Congress has not provided the required funds. He believes that the Federal Courts Study Committee should address the issue of inadequate funding for the court security program, but as part of the larger question of inadequate funding for the Judiciary as a whole.

**4. Reexamine the Role of GSA in Contracting for Renovations and Construction of Judicial Facilities**

Current budget allocations for construction do not allow for anticipated periodic renovation of cellblocks and Marshals' office areas. If the Marshals Service is not given substantial funding for renovation and construction directly, then some form of agreement between the Justice Department, the Judiciary and GSA may be necessary to guarantee that GSA provides for judicial facility cellblock repair.

Mr. Meham states that this problem is essentially an operational matter that need not be addressed by the Federal Courts Study Committee. He will pass it along to the Judicial Conference's Committees on Court Security and Space and Facilities.

**5. Coordinate the Interagency Exchange of Information**

The current legislation defining interagency sharing of information should be reexamined for suitability and application. For example, both the Marshals Service and Pretrial Services collect personal history information from defendants/prisoners. It would be ideal if both organizations could share this information. The major obstacle to exchanging information is the legislative requirement to ensure the confidentiality of a defendant's personal history information. Whether the Marshals Service is exempt from this restriction is open to interpretation given the existing statutory language.

Mr. Meham states that this matter is one of legislative interpretation and operational policy. It does not appear to be an issue that needs to be addressed by the Federal Courts Study Committee. He will pass it along to the Probation Division, who may wish to bring it to the attention of the Judicial Conference's Committee on Criminal Law and Probation.

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MAY 18 1989

CHIEF JUDGE CAMPBELL

L. RALPH MECHAM  
DIRECTOR

JAMES E. MACKLIN, JR.  
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

WASHINGTON, D.C. 20544

May 15, 1989

Honorable Levin H. Campbell  
Chief Judge, U.S. Court of Appeals  
1618 John W. McCormack Post Office  
and U.S. Courthouse  
Boston, Massachusetts 02109

Dear Judge Campbell:

Thank you for sending me a copy of Stanley Morris' letter recommending that the Federal Courts Study Committee evaluate five issues of particular concern to the United States Marshals Service.

Most of the issues are presently under consideration by this office or a Judicial Conference committee. I believe that your "structure" subcommittee might well be of help to us on a couple of them.

1. Limit the Number of Court Sites to Reduce Security Risks

The places of holding court for the district courts are prescribed specifically by statute. 28 U.S.C. §§ 81-131. The district courts themselves are authorized to determine when they will hold court at each location, and they may pretermitt sessions of court for insufficient business or for other good cause. 28 U.S.C. §§ 139-140. The Judicial Conference determines the places of holding court for the bankruptcy courts. 28 U.S.C. § 152(b)(1).

There are about 200 official district court locations in the country where there is no resident judge or full-time magistrate and little or no judicial activity. At more than 100 of these locations we maintain court facilities for which we pay rent to the General Services Administration. Based on the pertinent caseloads, it appears that several of these

locations could be abandoned without posing an unreasonable burden upon local attorneys and litigants. This action would reduce security risks, as Mr. Morris suggests. It would also reduce the Judiciary's operating costs in a time of severe budget shortages and cut down on travel time for judges and supporting personnel.

On several occasions attempts have been made by the Judiciary to close some of the less-used federal facilities. Invariably, however, the efforts have been met by solid opposition from local bar associations and civic authorities and from the local members of Congress. In a nutshell, the political reality is that it has been almost impossible to shut down a place of holding court.

The Judicial Conference's Committee on Judicial Improvements is exploring this issue, and I understand that Judge Lee Sarokin has prepared a report for consideration at the committee's June meeting. I believe that the Federal Courts Study Committee might well be of help to us on this matter, but suggest that you may want to wait for the Judicial Improvements Committee report on places of holding court. I will make sure that you receive a copy as soon as it is available.

2. Establish Alternative Methods to Produce Prisoners for Court Appearances

Mr. Morris states that every time a prisoner is produced for a court appearance there is a degree of security risk. He advocates substituting closed-circuit television or teleconferencing for a prisoner's physical presence in court.

Clearly, serious policy issues are raised by this proposal, and the Federal Rules of Criminal Procedure might have to be revised. Rule 43, for example, requires the "presence" of the defendant for virtually all court proceedings, and Rule 10 specifies that the arraignment shall be conducted "in open court." Moreover, questions of credibility have traditionally been addressed by having the witnesses appear in the courtroom face to face with their accusers and the attorneys and having the judge or jury look them directly in the eye before making their factual determinations. The conduct of an evidentiary proceeding by television represents a substantial break with tradition.



Upon the recommendation of the Judicial Improvements Committee, the Judicial Conference has authorized an experimental videoconferencing program for initial appearances, arraignments (not guilty pleas only), and prisoner civil rights and habeas corpus cases. (See 1988 Proceedings of the Judicial Conference at page 84.) I understand that the first pilot is about to get under way in the District of Arizona.

The videotaping of depositions is already a relatively common practice in civil litigation. Moreover, many judges conduct certain pretrial conferences and most status conferences by telephone. These proceedings, of course, do not involve issues of credibility, and they seem to raise fewer policy concerns.

I believe that a good deal more study and thought is required in this area regarding the practical problems and legal issues, particularly those arising in criminal cases. Since the matter falls within the jurisdiction of the Judicial Improvements Committee, which is actively studying the matter, I am not sure that the Federal Courts Study Committee needs to become involved at this point.

3. Provide an Adequate Number of Court Security Officers Assigned to Each Courthouse

Mr. Morris complains that the Marshals Service does not have a sufficient number of court security officers to protect federal court facilities. He is absolutely correct. There are 1,139 officers currently on duty across the country. At least 1,865 officers are needed, though. We have a growing number of places of holding court where there are full-time judicial officers in residence without any court security officer presence at all.

The problem is one of funding, rather than substance. An excellent system is in place whereby the local court security committees in each district develop security plans and identify their security resource needs. Their requests for officers and equipment are submitted through the Marshals Service to the Administrative Office, the Judicial Conference, and the Congress. The Judiciary has requested adequate resources for the security program, but the Congress has simply not provided the required funds.

I believe that the Federal Courts Study Committee should address the issue of inadequate funding for the court security program, but as part of the larger question of inadequate funding for the Judiciary as a whole. Court security is just one aspect of a very serious funding problem that pervades all segments of the Judiciary's budget. The continuing failure of the Congress to provide appropriate resources to the Judiciary clearly has a negative impact on its efficiency and effectiveness.

4. Reexamine the role of GSA in Contracting for Renovations and Construction of Judicial Facilities

Mr. Morris states that the existing contracting procedures to renovate or construct judicial facilities is in need of serious examination. Moreover, GSA's budget allocations assign a very low priority to the renovation of cell blocks and other marshals' areas. He recommends either that the Marshals Service be given more money for renovation and construction directly or that an agreement be reached among the Judiciary, the Justice Department, and GSA to provide for court house cell block repairs.

The problem, again, appears to be one of budget, compounded by internal Executive Branch priorities. We have always taken the position that cell blocks and marshals' areas are outside the responsibility of the Judiciary. I am not sure that we have a legitimate role to play in these matters. In any event, I believe that this is essentially an operational matter that need not be addressed by the Federal Courts Study Committee. I would be pleased to pass it along to the Judicial Conference's Committees on Court Security and Space and Facilities.

5. Coordinate the Interagency Exchange of Information

Mr. Morris recommends that the Marshals Service be authorized to share personal history information on defendants and prisoners with the courts' pretrial services offices. He points out that the major obstacle to exchanging information is the legislative requirement to ensure the confidentiality of a defendant's personal history information.



Honorable Levin H. Campbell  
Page 5

I believe that this matter is one of legislative interpretation and operational policy. It does not appear to be a matter that needs to be addressed by the Federal Courts Study Committee. I will pass it along to the Probation Division, who may wish to bring it to the attention of the Judicial Conference's Committee on Criminal Law and Probation.

I hope that this information is of some help to you. Members of my staff are familiar with these matters and would be pleased to assist you and Denis Hauptly in any way possible.

Sincerely,



L. Ralph Mecham  
Director

cc: Chief Judge Charles Clark  
Judge Joseph F. Weis, Jr.  
Judge H. Lee Sarokin  
William Slate

**Suggested Areas to Examine  
by the Federal Courts Study Committee**

In response to the Federal Courts Study Committee's request for information and opinions, the Marshals Service recommends that the committee evaluate the following issues. These concerns are of particular interest to the Service, not only because they impact this organization directly, but because they affect the daily functions of the Federal judiciary and courts.

**1. Limit the Number of Court Sites to Reduce Security Risks**

Historically, the creation of places to hold court have not taken into account an area's ability to support trial activity. Often times a site is chosen without having available cellblock space in the facility or within the local area. The U.S. Marshals Service should review facility requests and make recommendations on building security, availability of jail space, and provide other necessary requirements such as workspace for the U.S. Marshals Service. A policy may need to be established to regulate the number of court sites to ensure the security of judicial proceedings.

**2. Establish Alternative Methods to Produce Prisoners for Court Appearances**

Each time a prisoner is produced for a court appearance, there is a certain degree of security risk. Eliminating this risk is unlikely given the nature of the court system, however, in certain situations security risks can be eliminated by using closed-circuit television or tele-conferencing to substitute for a prisoner's physical presence in court. This equipment would enable jurors and judicial officers to communicate directly with material witnesses or other trial participants who are being held in nearby or distant detention facilities.

**3. Provide an Adequate Number of Court Security Officers Assigned to Each Courthouse**

The Marshals Service is responsible for ensuring the integrity of the Federal judicial system by establishing and maintaining security for 507 Federal judicial facilities nationwide. During FY 1988, a total of 1,139 CSOs were on duty in 94 judicial districts. Due to inadequate staffing levels, the opening of new facilities, and the movement of CSOs to other more critical locations, there are 87 locations without CSO coverage. The Marshals Service estimates that 211 additional officers are needed to secure the 87 judicial facilities. Furthermore, 278 more CSOs are needed to enforce the recent legislation prohibiting firearms from being brought into federal facilities.

**4. Reexamine the Role of GSA in Contracting for Renovations and Construction of Judicial Facilities**

The existing contracting procedures to renovate or construct judicial facilities is in need of serious examination. Current budget allocations for construction do not allow for anticipated periodic renovation of cellblocks and U.S. Marshals' office areas. The General Services Administration (GSA) has a huge inventory of building projects, but a very limited budget to meet each agency's needs. Consequently, cellblock renovations and similar building projects are given low budgetary priority by GSA. If the U.S. Marshals Service is not given substantial funding for renovation and construction directly, then some form of agreement between the Justice Department, the Judiciary, and GSA may be necessary to guarantee that GSA provides for judicial facility cellblock repair.

**5. Coordinate the Interagency Exchange of Information**

The current legislation defining interagency sharing of information should be reexamined for suitability and application. For example, both the U.S. Marshals Service and Pretrial Services collect personal history information from defendants/prisoners. It would be ideal if both organizations could systematically share this information rather than collect duplicate sets of data independently. In this case, as in other instances, the major obstacle to exchanging information is the legislative requirement to ensure the confidentiality of a defendant's personal history information. Whether the Marshals Service is exempt from this restriction is open to interpretation given the existing statutory language.

# Office of Senior Judge

## THE OFFICE OF SENIOR JUDGE

Submitted by

Robert E. Keeton  
District Judge, United States District Court  
for the District of Massachusetts

### Summary

The Office of Senior Judge was created by Congress in 1919. Act of February 25, 1919, 40 Stat. 1156. The 1919 Act authorized judges to "retire" at age 70 after 10 years of service while continuing to maintain the "office" of Article III judge and continuing to perform judicial duties in "retired" status. Prior to 1919 an Article III judge could resign his office at age 70, after 10 years of service, with a continued right to the salary of the office at the time of his resignation. Article III judges were given this resignation with salary in 1869. Act of April 10, 1869, 16 Stat. 44. However, the Act of 1869 made no provision for continued judicial service; a judge who resigned was therefore disqualified from performing any judicial duties thereafter. Prior to the 1869 Act, there was no resignation or retirement system available for federal judges. Therefore, elderly judges - even those suffering from physical or mental incapacity - had to either remain in office as a regular active judge or resign the office without any retirement income whatsoever. The situation was obviously unfair to both the individual judge suffering from incapacity and the system that found itself burdened with judges who could no longer function effectively.

In attempting to understand why Congress chose to create the senior judge system, to remedy the situation described above, one must understand the importance of two constitutional provisions concerning the office of Article III judges. The first provision mandates that an Article III judge's salary can not be diminished during the lifetime of the judge. The second states that federal judges shall retain their office during good behavior and can only be removed by impeachment. The framers of our constitution included those provisions in order to ensure an independent judiciary. Unfortunately, those provisions resulted in a lack of a retirement system for federal judges and forced elderly judges - even when faced with diminishing capacity - no realistic choice but to remain on the bench in order to have an income. Realizing this dilemma, Congress first provided for a retirement system in 1869 as noted above. The retirement system, however, did not allow an elderly judge who could, perform part but not all of the work of an active judge, to continue providing any judicial service to the system. It, therefore, unnecessarily robbed the judicial system of the service of a large number of learned judges who were willing to work part-time but simply could not perform full time as an active judge. Recognizing this problem in 1919, Congress as



noted above, created the senior judge system. Thus restating Congress' commitment to ensuring adequate financial safeguards for elderly judges and allowing the federal judicial system to reap the benefits of the service of a group of experienced judges.

The present senior judge system allows a judge two choices upon reaching retirement age:

- (1) the judge may retire, in which case he or she is entitled to the salary of the office at the time of retirement, for life, is no longer available for judicial service, and may engage in the practice of law; or
- (2) the judge may take senior status. In that case the judge continues to receive the salary of the office including any subsequent increases, and may continue to perform judicial duties if designated and assigned.

Presently a judge may take senior status if he is 65 and has served at least 15 years on the bench. A sliding scale in the statute permits judges at age 66 to take senior status after 14 years, age 67 after 13 years, age 68 after 12 years, age 69 after 11 years and age 70 and above after 10 years.

In addition to providing the system with the valuable services of senior judges, the retirement of a judge or the taking of senior status by a judge creates a vacancy which can be filled. Thus increasing the total judge resources available for meeting the workload of the federal court system. Other than the ability to continue performing judicial work, the main difference between a federal judge who retires from office versus a federal judge who takes senior status is the compensation that will be paid that judge. A judge who retires is entitled to "an annuity equal to the salary he was receiving at the time he retired". 28 U.S.C. §371 (a). A judge who takes senior status is entitled to the same salary as a regular active judge, including any salary increases or cost of living adjustments. In addition, a senior judge who is certified by his Judicial Council as performing substantial judicial work is entitled to office space and support staff at a level determined by the Judicial Council. Senior judge staffing is about 1/3 the normal staffing pattern.

At present, senior judges account for approximately 30% of the total number of Article III judges and do approximately 10-15% of the work of the federal judiciary. It has been estimated that without senior judges, there would be a need to create an additional 80 Article II judgeships at an increased cost to the judiciary of approximately \$45 million.

Proposals for changes in the statutes and regulations bearing upon the office of senior judge have been made quite frequently in the past year, mostly in connection with the pay issue relating to the legislative executive and judicial branch. Unfortunately, senior judges have come under attack as not deserving pay increases



because of the few examples of senior judges who are not performing any real substantial judicial work. (The press reports mentioned the Director of the Federal Judicial Center, Judge Godbold, and former Chief Justice Burger, as senior judges performing no judicial services and therefore, apparently, not deserving of any pay increases. Both men, obviously, still perform full time jobs for the judiciary, even though they do not hear cases. We mention this only to give the subcommittee a flavor of the press coverage.)

#### Recommendations

Judge Keeton's article forcefully and convincingly argues that "it is in the public interest that the principal features of [the] statutory definition of 'senior judge' remain intact." Judge Keeton convincingly argues that any substantial loss of senior judge power would dramatically impact on the ability of the federal judiciary to meet its workload. Judge Keeton also makes a convincing argument that a potential decrease in the number of elderly judges choosing senior status might occur if choosing senior status would result in a judge not receiving pay raises and cost of living increases. The judge also points out that the removal of pay raises and cost of living increases from applicability to senior judges would be unfair in light of the significance of the work performed by senior judges. Finally Judge Keeton argues that any modifications aimed at improving the efficiency and fairness of the senior judge system should be "evaluated by standards concerned with (1) practical effectiveness for the judicial system as a whole, (2) fairness to individual judges, and (3) consistency with the constitutional guarantees of independence of the Third Branch."

#### Comments

It is suggested that the Federal Courts Study Committee strongly support the present senior judge system by issuing a statement modeled on Judge Keeton's recommendations.

## THE OFFICE OF SENIOR JUDGE

How and Why the Framers and Congress Created the Office; the Work of Senior Judges; the Constitutional and Statutory Obligations and Benefits of the Office; Criteria for Assessing Proposed Changes.

### Summary

#### I.

The term "senior judge" has a specially defined meaning in the federal system. That meaning is based on provisions of the Constitution of the United States regarding "Judges." Article III, Section 1, declares that the "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, ...." The unqualified term "senior judge" is defined in 28 U.S.C. §294(b) to mean an Article III judge "who has retired from regular active service" but continues to hold the "office" of Article III "judge" under conditions specified in other statutes. (See Part I below.)

#### II.

Senior judges currently do more than one-eighth of all the work done by all Article III judges combined. This figure, however, only partly discloses the impact of the contribution that senior judges make to the administration of justice. If they had not been available to the circuit and district courts during the last decade, backlogs would have overwhelmed the system. Providing

through new judgeships for the work senior judges have done during that period would have required the creation of approximately 80 new judgeships. The budgetary cost would have been several hundred percent greater than the budgetary cost of the senior judge system. (See Part II below.)

### III.

Congress created "senior judge" status in order to serve compelling public interests as well as an interest in fair treatment of elderly judges whose long judicial service would entitle them to reasonable "retirement compensation" (or "pension equivalency benefits") even if there were no constitutional guarantee of compensation.

Before Congress acted, there was no retirement system and no pension for judges. Elderly judges, faced with the hard choice of remaining fully active or resigning without any retirement benefit, tended to stay on, and they could not be removed "during good Behaviour."

To ease the problem of the hard choice faced by an elderly judge in failing health, Congress has enacted statutes that enable a judge to elect to "retire from the office" at the level of pay in effect at the time of retirement. Just as a "resignation" from the office of Article III judge had done and still does, a "retirement from the office" creates a judicial vacancy to which the President appoints a new judge, with the advice and consent of the Senate. A "retirement from the office," however, like a "resignation," causes the judicial system to lose

the benefit of the substantial judicial work that can be done by an experienced judge, if he or she continues to carry a substantial workload even though not remaining fully active.

It was in this setting that Congress created "senior judge" status. One objective was to bring new blood and vigor to the judiciary. The method was to create a vacancy in the constitutionally defined Office of Article III "Judge," so a new Article III judge could be appointed.

A second objective was to continue to reap the benefits of services of elderly judges who were able to perform distinguished judicial service, even if not with the same pace and vigor as before. The method was to create an option to perform the judicial work an elderly judge was capable of doing, despite physical infirmities that would, over the years, disable many of them from handling the workload of "regular active service." The "senior judge" option was meant to be one that an elderly judge could elect as an honorable alternative to choosing between the harsh extremes of resigning or remaining on "regular active service" despite personal difficulties in doing so.

A third objective was to increase the total judicial resources to meet the increasing workload of the federal court system at lower budgetary cost than would be incurred by simply increasing authorized Article III judgeships.

#### IV.

The statutes enacted by Congress to serve all of the interests identified above, and to do so within the framework of

an independent Third Branch as provided in Article III of the Constitution, have defined the obligations and benefits of "senior judges" in a way that has contributed very significantly to enabling the judiciary to meet its increasing workload. This has been done, also, in a way that adds to the total judicial capacity of the system at a net cost far lower than would be incurred in providing for the same increase in judicial capacity in any other way.

It is in the public interest that the principal features of this statutory definition of "senior judge" remain intact. A substantial loss of the present capacity of the federal judiciary to perform its function would otherwise occur. (See Part IV below.)

#### V.

Within the framework of the principal features of the "Office of Senior Judge," proposed modifications aimed at improving the efficiency and fairness of the "senior judge" system are worthy of consideration. Proposals<sup>1</sup> should be evaluated by standards concerned with (1) practical effectiveness for the judicial system as a whole, (2) fairness to individual judges, and (3) consistency with the constitutional guarantees of independence of the Third Branch. \ (See Part V below.)

## Part I.

## The "Office of Senior Judge" Defined

## A. The Constitutional Provisions Regarding Article III Judges

The term "senior judge" has a specially defined meaning in the federal system. The starting point for understanding that meaning is Article III of the Constitution of the United States."

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their services, a Compensation, which shall not be diminished during their Continuation in Office.

Constitution of the United States, Art. III, Sec. 1 (emphasis supplied).

The power of appointment to the "Office" of Article III "Judge" is prescribed in Article II.

He [the President] ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Constitution of the United States, Art. II, Sec. 2 (emphasis supplied).

Removal of an Article III judge from "Office" can be accomplished only by voluntary resignation or by impeachment for



noncompliance with the condition of "good Behaviour." Article I of the Constitution prescribes the impeachment power.

The House of Representatives ... shall have the sole Power of Impeachment.

Constitution of the United States, Art. I, Sec. 1.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Constitution of the United States, Art. I, Sec. 3 (emphasis supplied).

#### B. Legislatively Authorized Retirement Alternatives

The Constitution does not provide for "retirement" of Article III judges. In the absence of any retirement system, an elderly judge -- even one in failing health -- would have only the hard choice between resigning and remaining obligated for regular active service. One who could not afford to be without income would have no practical choice but to stay on the bench, even after physical or mental abilities began to wane.

The Constitution does not speak to this need in any explicit way. That is, it does not explicitly delegate authority

to any person or agency to provide a retirement system for judges. It is nevertheless an accepted premise of the enactment of statutes on the subject that it is constitutionally permissible for Congress to establish one or more additional options an eligible judge may voluntarily accept rather than facing only the hard choice between resigning and remaining under the obligation to be fully active for life. The first such statute was enacted in 1869 (Act of April 10, 1869, 16 Stat. 44, permitting a judge at age 70, after 10 years of service, to "resign" with continued right to the salary of the office of the time of resignation). That statute made no provision for continued judicial service of any kind; a judge who "resigned with salary of the office of the time of resignation" was disqualified from performing any judicial duties thereafter. In 1919 Congress enacted legislation authorizing judges to "retire" at age 70 after ten years of service while continuing to retain the "office" of Article III judge and continuing to perform judicial duties in "retired" status. Act of Feb. 25, 1919, 40 Stat. 1156. As will be stated in the explanation of current options, immediately below, this option remains in effect today but is officially called "retiring" from office rather than "resigning" from office on salary. The history of additional legislation from 1919 to the present is summarized in Appendix 3, statement of Honorable Frank M. Coffin, April 27, 1981.

The amended and expanded statutes now in effect have created additional options, which are listed here between the extremes of "resignation" (option 1) and remaining in "regular

active service" (option 4).

Following is the entire range of options now available to a judge:

1. Resign from the office of judge.

This is an option not explicitly stated in the Constitution but generally considered to be implicit. It was available even before the enactment of the first legislation on the subject in 1869.

One may exercise this option at any time.

Under this choice, the judge receives no retirement benefits of any kind. See Booth v. United States, 291 U.S. 339 (1933).

2. Retire from the office of judge.

Section 371(a) of Title 28, United States Code, authorizes this form of retirement.

The judge who elects this option "shall, during the remainder of his lifetime, receive an annuity equal to the salary he [or she] was receiving at the time he [or she] retired." 28 U.S.C. §371(a). With slight modification by more recent legislation, this is the option that was created by legislation in 1919.

A judge electing this option cannot thereafter perform any duties of the office of Article III judge.

A person who has exercised this option is free of all of the constraints of judicial office, including those against earning outside income and participating in political activities.

To be eligible for this form of retirement, one must meet the following age and service requirements:

Attained age:	Years of Service
65 .....	15
66 .....	14
67 .....	13
68 .....	12
69 .....	11
70 .....	10

28 U.S.C. §371(c).

3. Retire from regular active service to the status of "senior judge."

There are two different ways one may become eligible to retire from regular active service. One way is to meet age-and-service requirements; the other is to meet a disability requirement. A person who retires from regular active service for either of these reasons is a "senior judge." 28 U.S.C. §294(b). This statute applies the designation of "senior judge" to a person who has elected disability retirement, even if relatively young when the disability occurs.

a. Age-and-service retirement from regular active service

Section 371(b) authorizes this form of retirement upon meeting the age-and-service requirements stated in Section 371(c), quoted above.

Each person in this group remains in the office of judge, "shall, during the remainder of his [or her] lifetime, continue to receive the salary of this office," 28 U.S.C. §371(b), and "shall be known and designated as a senior judge and may continue to perform such judicial duties as he [or she] is willing and able to

undertake, when designated and assigned as provided in subsections (c) and (d)," 28 U.S.C. §294(b). Persons in this group are the ones whose work, "office," obligations and benefits are the principal focus of this paper.

**b. Disability retirement  
from regular active service**

Section 372(a) authorizes this form of retirement.

One "who becomes permanently disabled from performing his [or her] duties may retire from regular active service," and a person

retiring under this section after serving ten years continuously or otherwise shall, during the remainder of his [or her] lifetime, receive the salary of the office. A justice or judge retiring under this section who has served less than ten years in all shall, during the remainder of his [or her] lifetime, receive one-half the salary of the office.

28 U.S.C. §372(a) (emphasis added). If the "salary of the office" is increased after such a disability retirement, the disabled judge receives the benefit of that increase. This is in contrast with the level of compensation for one who, having "retired from the office," thereafter receives only the salary he or she was receiving at the time of retirement, as stated under option 2, above.

A person who is eligible for and elects this disability retirement option continues to hold the office of judge, "to receive the salary of the office," 28 U.S.C. §371(b), subject to the conditions stated in 28 U.S.C. §372(a), and "shall be known and designated as a senior judge and may continue to perform such



judicial duties as he [or she] is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d)," 28 U.S.C. §294(b). Relatively few persons have qualified for and elected this option to retire for disability. Fewer still have been designated and assigned to perform judicial work after disability retirement.

Although persons in this group are among those designated as "senior judges," most of the public discussion about "senior judges" and their obligations and benefits has been focused not on this group but instead on those in category 3a, just above.

#### 4. Continue in regular active service

A person who elects this option continues in the office of Article III judge, with all its obligations and benefits, and is subject to removal only by impeachment.

#### C. Vacancies From Retirement

A judge who is eligible for and elects any one of the options described above other than option 4 "resigns" or "retires," and a vacancy is created. This point is implicit as to "resignation" and is explicitly stated in the two statutes that, together provide for all of the forms of "retirement."

The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires under this section.

28 U.S.C. §371(d).

Any justice or judge of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his [or her] duties may retire from regular active service, and the President shall, by and with the advice and consent of the Senate, appoint a successor.

28 U.S.C. §372(a).

Because a successor is appointed for every retired judge, a retirement produces an increase in the total judicial capacity of the system to an extent approximating the amount of the judicial work that the retired judge continues to perform, while his or her successor is performing "regular active service."

## Part II.

### The Judicial Workload of Senior Judges

Senior judges currently do more than one-eighth of all the work done by all Article III judges combined.

Records of the Administrative Office of the United States Courts show the following comparison between the number of "authorized Judgeships" and the number of "Senior Judges as of 3/8/89:"

Court	Authorized Judgeships	Senior
Supreme Court	9	2
United States Court of Appeals	168	68
United States District Courts	572	231
Court of International Trade	<u>9</u>	<u>5</u>
Totals	758	306

The next Table summarizes the work of the senior judges at all levels where Article III judges sit. The scope of the work

they do is illustrated by the fact that in the District Courts, in 1988, their hours on the bench were a bit more than 13% of all hours on the bench in trial and in other proceedings of all Article III judges combined. The exact figures were 13.2% of hours in trial and 13.3% of hours in other proceedings.

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United States Courts of Appeals and District Courts  
Work of Senior Judges  
During the Years Ended June 30, 1984 - 1988

Type of Activity	1984	1985	1986	1987	1988
<b>Courts of Appeals:</b>					
All Participations in Oral Hearings and Submissions on Briefs .....	44,048	49,854	55,467	56,579	58,714
Senior Judges Only .....	6,414	7,547	8,031	7,748	7,665
Percent of All .....	14.6	15.1	14.5	13.7	13.1
<b>District Courts:</b>					
All Civil and Criminal Defendants Terminated .....	291,438	320,267	320,122	295,668	295,194
Senior Judges, Only .....	27,911	30,548	28,601	26,227	28,243
Percent of All .....	9.6	9.5	8.9	8.9	9.6
All Trials Conducted .....	21,696	20,605	20,693	20,364	20,180
Senior Judges, Only .....	2,096	2,348	2,170	2,347	2,554
Percent of All .....	9.7	11.4	10.5	11.5	12.7
All Hours in Trial .....	273,018	265,316	276,863	287,103	278,706
Senior Judges, Only .....	29,560	32,091	29,944	34,569	36,690
Percent of All .....	10.8	12.1	10.8	12.0	13.2
All Hours in Other Proceedings .....	133,379	136,589	146,471	151,270	156,211
Senior Judges, Only .....	15,190	16,992	17,488	18,244	20,718
Percent of All .....	11.4	12.4	11.9	12.1	13.3

The foregoing figures, impressive though they are, fail to tell the whole story of the significance to the system of the work of senior judges. Some of the more dramatic and significant illustrations appear in the letters of Circuit Chief Judges, appended to Judge Coffin's statement of April 27, 1989, which is attached to this report as Appendix 3.



## Part III.

## The Public Interests Served by Retirement Options

As noted in Part I, although the Constitution made no explicit provision for any form of "retirement" by Article III judges, Congress has fashioned three forms of "retirement" (referred to in Part I as options 2, 3a, and 3b), and when a judge becomes eligible for one of these, he or she may elect that retirement option rather than facing the hard choice of resigning or continuing in "regular active service."

Congress created "senior judge" status in order to serve compelling public interests as well as an interest in fair compensation of elderly judges whose long judicial service would entitle them to reasonable "retirement compensation" (or "pension equivalency benefits") even if there were no constitutional guarantee of compensation.

The first action by Congress on this subject occurred in 1869. Before that time, there was no retirement system and no pension for judges. Elderly judges, faced with the hard choice of remaining fully active or resigning without any pension or retirement benefit, tended to stay on, and they could not be removed "during good Behaviour."

Legislative history recounts some stories of severe impairment of public interests in fair and efficient administration of justice, because elderly disabled judges could not be persuaded to resign. Other stories recount the great anguish of individual judges who recognized their disability but faced distressing

economic hardship if they resigned because there was no pension system or any other provision for meeting health care costs and other catastrophic expenses for themselves and their dependents and survivors.

To ease the problem of the hard choice faced by an elderly judge in failing health, Congress has enacted statutes that enable a judge to elect to "retire from the office" at the level of pay in effect at the time of retirement. Just as a "resignation" from the office of Article III judge had done and still does, a "retirement from the office" creates a judicial vacancy to which the President appoints a new judge, with the advice and consent of the Senate.

A "retirement from the office," however, like a "resignation," causes the judicial system to lose the benefit of the substantial judicial work that can be done by an experienced judge, if he or she continues to carry a substantial workload even though not remaining "in regular active service."

It was in this setting that Congress created "senior judge" status. One objective was to bring new blood and vigor to the judiciary. The method was to create a vacancy in the constitutionally defined Office of Article III "Judge," so a new Article III judge could be appointed.

A second objective was to continue to reap the benefits of services of elderly judges who were able to perform distinguished judicial service, even if not with the same pace and vigor as before. The method was to create an option to perform

the judicial work an elderly judge was capable of doing, despite physical infirmities that would, over the years, disable many of them from handling the workload of "regular active service." The "senior judge" option was meant to be one that an elderly judge could elect as an honorable alternative to choosing between the harsh extremes of resigning or remaining on "regular active service" despite personal difficulties in doing so.

A third objective was to increase the total judicial resources to meet the increasing workload of the federal court system at lower budgetary cost than would be incurred by simply increasing authorized Article III judgeships.

As a practical matter, the system has served well all these public interests that Congress sought to accommodate. A change of circumstances developing gradually through the 1970s and 1980s, however, now threatens the future effectiveness of the system.

To understand the change and its potential effect, one may note first that until the mid 1980s very few judges elected option 2 (retirement from office, at then-existing salary, after meeting age-and-service requirements). Data supplied by the Administrative Office of the United States Courts show two instances of such retirement in the 1970s (Appendix 3, Coffin Statement, p. 12, n.3), and two more in the early 1980s (id.). In 1984, Congress enacted legislation that eased the age-and-service requirements; from the time of that amendment to April 1989, ten more judges elected to "retire from office."

Expectations regarding the likelihood and the amount of future increases in the "salary of the office" may have a significant effect on the numbers electing this option in the future. For example, a judge who has met age-and-service requirements at an age between 65 and 70, is in good health, and wishes to remain professionally active for years and perhaps decades longer, makes a very substantial financial sacrifice by electing "retirement in senior status" rather than electing option 2. By electing option 2, the judge is freed of all constraints on income-producing activities, and ordinarily could expect to earn many times more than would ever be realized from increases in the "salary of the office." Especially if the judge has felt some personal unease about having imposed financial constraints on his or her spouse and children in order to serve as a judge, he or she may conclude that continuing to impose that sacrifice on family members becomes an increasingly difficult choice.

It seems likely that, absent developments that sharply change present expectations, the percentage of eligible judges who elect option 2 (to "retire from the office of judge") will rise significantly, with a corresponding loss to the judiciary of the judicial work they would have performed had they elected to become "senior judges."

Unlike one who has "resigned" or has "retired from the office," a "senior judge" still holds the "Office" of Article III judge. Under the Constitution, it would seem, such an officeholder

must receive the compensation of that "Office." As a practical matter, however, in creating "senior judge" status Congress developed a system in which the "salary of the office" that a "senior judge" receives serves in part as a "retirement benefit" (or, as it will often be referred to in this paper, a "pension equivalency benefit") for the long period of public service that is a prerequisite to "senior judge" status. In addition, part of the "salary of the office" serves as compensation for the current work that the senior judge continues to perform. In many instances, the period of service of the judge (especially when the work after taking senior status is counted at least proportionally to the load carried) is so long that comparable pension plans in the private sector, and in other branches of government, would create a "pension equivalency" in excess of the "salary of the office." In these instances, the work that the judge does is truly "volunteer" work -- performed by a judge who has been in public service long enough to deserve a pension (by any standard that might apply in the absence of a constitutional guarantee of compensation) but elects to continue to work in "senior judge" status. (See Part III below.)

As noted in Part IB above, the term "senior judge" is derived from a statute appearing in Title 28 of the United States Code.

Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he [or she] is willing and able to

undertake when designated and assigned as provided in subsections (c) and (d).

28 U.S.C. §294(b).

Any justice or judge of the United States appointed to hold office during good behavior may retain the office but retire from regular active service after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) of this section and shall, during the remainder of his lifetime, continue to receive the salary of the office.

28 U.S.C. §371(b) (emphasis supplied). It is generally understood that congress included the emphasized words and phrases in recognition of the constitutional mandates that "Judges ... hold their Offices" for lifetime, "during good Behavior," and that they shall "receive for their services, a Compensation, which shall not be diminished during their Continuance in Office." These mandates were a vital part of the Framers' overall plan for an independent "Third Branch."

#### Part IV.

##### Obligations and Benefits of the Office of Senior Judge

Many of the statutory provisions defining the obligations and benefits of the office of "senior judge" are collected in Chapter 17 of Title 28 of the United States Code (Sections 371-376).

The caption for Chapter 17 is, "Resignation and Retirement of Justices and Judges." Before amendment in 1984, Section 371 was captioned "Resignation or retirement for age," and the text provided that one "who resigns after attaining the age of



seventy years and after serving at least ten years continuously or otherwise shall, during the remainder of his lifetime, continue to receive the salary which he was receiving when he resigned." The 1984 amendment changed the name of this option from "resignation" to "retirement on salary." At the present time, the term "resignation" appears only in "Notes" and not in the text of any of the sections of Chapter 17. Thus, strictly speaking, one may now refer to "resignation" only as the option listed as number 1 of the 4 options described in Part I above.

A brief statement of the effects that a "resignation" in this strict sense has on the obligations and benefits of a "judge" will be stated in Part A, next below, to serve as a contrast that illuminates the scope of the obligations and benefits of "retirement from the office" summarized in Part B, and the scope of the obligations and benefits of the office of senior judge, discussed in Part C below.

#### A. Effects of "Resignation"

One who resigns from the office of Article III judge, surrenders virtually all benefits and is relieved of virtually all obligations. The few exceptions are not relevant to the purposes of the present paper. A judge would never be expected to "resign" if he or she were eligible either to "retire on salary" from the office of judge (after meeting age-and-service requirements) or to "retire from regular active service" (after meeting age-and-service requirements or because of disability). Some confusion occasionally arises in current discussion of the options because

of the fact, noted above, that "resign" had a different meaning before the 1984 amendments of the statutes.

It is sufficient for present purposes to note that one who resigns gives up salary, receives no retirement annuity, is free to practice law and engage in political activities, and in general neither enjoys any of the benefits of judicial office nor suffers any of the constraints upon judges regarding non-judicial activity.

#### B. Effects of "Retiring From the Office"

A judge who elects this option continues to receive for life "an annuity equal to the salary he was receiving at the time he retired." 28 U.S.C. §371(a). This option is sometimes referred to as "retirement on salary." A judge who has "retired from the office" is not entitled to any increase that may be enacted as compensation for the office of judge. The "annuity" serves the function of a "pension" or "retirement benefit," fixed in amount and without entitlement even to cost-of-living adjustments. That is, although Congress may as a matter of fairness enact cost-of-living adjustments when future inflation reduces the value of a fixed-dollar retirement benefit, a judge who has "retired from office" cannot successfully claim an entitlement to such a cost-of-living adjustment.

Some fringe benefits such as health and life insurance options continue to be available, but a person who has elected this option is not entitled to the benefits of the "office" of judge.

A person who has made this election can no longer perform

judicial services, is free to practice law and engage in political activities, and in general neither enjoys any of the benefits of judicial office nor suffers any of the constraints upon judges regarding non-judicial activities.

**C. Effects of "Retiring from Regular Active Service" to Senior Status**

The caption of Section 371 of Chapter 17, Title 28 of the United States Code, uses the phrase "retirement in senior status." The text of the same section does not repeat this phrase, nor does it use the phrase "senior judge." Rather that phrase appears in "Chapter 13--Assignment of Judges to Other Courts," Section 294 of which declares:

Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

28 U.S.C. §294(b). The remainder of the section is as follows:

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake.

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in

the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

(e) No retired Justice or judge shall perform judicial duties except when designated and assigned.

28 U.S.C. §294(c), (d), (e).

Section 294(e) makes clear that a senior judge may perform judicial duties only when designated and assigned. Their services are so critical to meeting workloads, however, that the chief judges who have the principal responsibility for assignments are eager to designate and assign any senior judge who is willing and able to serve.

One incidental benefit of the office of senior judge is that assignments may be made out-of-circuit more freely than is the case for judges in regular active service. A second incidental benefit is that a senior judge is relieved of the statutory requirement of residing within his or her circuit or district, pursuant to 28 U.S.C. §374. The official station of a senior judge

for purposes of computing travel expenses is the "place where [he or she] maintains the actual abode in which he [or she] customarily lives...." 28 U.S.C. §456.

Support services, including secretarial services, services of the Clerk's office, law clerks, and court reporters are available, though ordinarily at reduced levels unless a senior judge is carrying a load close to that of a judge in regular active service.

The Administrative Office of the United States Courts, in an advisory memorandum of March 30, 1989, states:

The Consolidated Omnibus Budget Reconciliation Act of 1986, Public Law No. 99-272, section 12112, amended section 209 of the Social Security Act and section 3121(i)(5) of the Internal Revenue Code to provide that, for the purposes of these sections, the term "wages" shall not include any payment of salary under 28 U.S.C. 371(b) received by a retired justice and senior judge during periods of continued judicial service by designation and assignment, as authorized by 28 U.S.C. section 294. Also, retirement pay received by a retired justice and a senior judge who is not performing judicial service is not considered "wages" for these purposes.

Retired justices and senior judges may continue to assume such judicial duties as they are willing and able to undertake without subjecting themselves to the deterrent effects of FICA tax and the reduction or termination of social security benefits during the period of such service.

#### D. The Significance of the Work of Senior Judges

The Administrative Office of the United States Courts has made the following assessment of the contribution of senior judges to the work of the judiciary:



Such judges continue to hold the judicial office and continue to receive the salary of the office because the Constitution requires that judicial salaries not be diminished. If they perform "substantial" judicial work, they also receive office space and support staff. "Substantial" work is determined by the judicial council for each circuit. This work may include judicial work outside of the courtroom. For instance, a senior judge who is adept at settling cases may spend all of his or her time in that task, which will not be reflected in caseload statistics. Senior judge staffing is about one-third the normal staffing pattern.

A senior judge, whether actually performing judicial duties or not, is covered by the Code of Conduct for United States Judges and 28 USC 454, which bars them from practicing law.

Senior judges account for some 29% of the federal judiciary and do approximately 10-15% of the work of the federal judiciary. In many circuits and districts, the work of senior judges has been indispensable to the proper conduct of judicial business. Without senior judges, the judiciary would need an additional 80 active judges - at a cost of approximately \$45 million, to compensate for the loss of the senior judges. Many perform judicial work well into their 80's. Some, of course, are unable to perform further work because of advanced age or ill health.

(Emphasis in original.)



## V.

## Criteria for Assessing Proposed Changes

Proposals for changes in the statutes and regulations bearing upon the Office of Senior Judge have been made rather frequently in the past, and more may be expected in the future. This section is not aimed at evaluating a particular proposal. Instead, the purpose is to identify aspects of the system that have been the object of criticism from time to time, the nature of changes proposed to meet those criticisms, and the impact they would have on the system, as far as can be reliably predicted.

The reliability of any predictions made will depend, in the first instance, on understanding how and why the system functions as it does. Central to that understanding is recognition of several points developed in earlier parts of this memorandum.

One. Pursuant to the framers' conception of government under law, guaranteed by the Constitution and effected through a government of three coequal branches, lifetime appointment of Article III judges, without reduction of their compensation, was one of the means adopted to secure the independence of the judiciary.

Two. Implicit in the Constitution, though not explicitly stated, are two options between which an Article III judge may elect at any time: he or she may either resign from the office of Article III judge unconditionally, retaining no benefits and having no further obligations of judicial service, or continue in the

office, entitled to all its benefits and subject to all its obligations.

Three. It has long been accepted that Congress may, consistently with the constitutional guarantees designed to secure the independence of the judiciary, create by statute options between the two extremes of resignation and continuing in the office. The reason is that other choices may be created without impairing the independence of the Third Branch. Indeed, well-fashioned additional choices may even strengthen the independence of the Third Branch while also serving other compelling public interests in increasing judicial resources.

Four. The impact that introduction of a new option, or the modification of an option previously created by statute, will have upon the judiciary, its resources, and its performance depends (a) upon the specific terms of the new or amended option, (b) how these terms will be perceived both by the public and by the judges to whom they are addressed, (c) how these terms will affect the choices likely to be made by Article III judges, (d) whether these terms in their practical impact will intrude upon the independence of the judiciary or in any other way approach or exceed constitutional bounds such as have been recognized to strike down legislatively fashioned conditions in other contexts.

If we put aside for separate consideration (not to be addressed here) concerns arising from reduction of real compensation by failure to make cost-of-living adjustments to compensate for inflation (which affect the entire judiciary and not

simply the office of senior judge), probably there is a consensus that the kinds of options regarding forms of retirement that have been fashioned by legislation now in effect have been constructive developments. They have enhanced the overall resources of the judicial branch at low cost and without any adverse impact on the independence of the judiciary or the dignity of the office. This assessment is supported by the observation that in the 1970s a relatively small percentage of judges elected to remain in "regular active service" for more than a brief period beyond age 70 [AOUSC figure to be inserted], few qualified for retirement on disability [AOUSC figure?], still fewer elected to retire from the office "on salary" in effect at the date of retirement [AOUSC figure 2/?], and the remainder [?/?] elected "senior judge" status and continued to perform substantial judicial work for more than a decade, on average, despite the fact that this is a group who in general were outliving "life expectancies" and, to a far greater extent, were outliving "work life expectancies" of the general population.

Data on choices in the 1980s, however, show disturbing and at least potentially alarming trends. It may be that these data still do not cast doubt on the efficacy of the terms of the options that are now in effect; rather, they may demonstrate that the erosion of inflation-adjusted real compensation has presented a very different practical choice in the 1980s. The reason is that a judge who is making the choice at some time between the ages of 65 and 70, and is in good health, could earn far more in practice than as a judge during the remaining years of professional

activity. In these circumstances, electing "senior judge" status leaves an exposure to catastrophic health care costs for this judge and his or her spouse and family, which the judge could avoid by retiring from office and engaging in an active and lucrative law practice for the years during which he or she would otherwise be performing judicial work as a senior judge or as a judge in regular active service.

Whether or not this interpretation of the data of the 1980s is the best explanation of the trend of change in choices, the fact remains that any proposed changes in the terms of the options to be available should be examined carefully from the point of view of what effect they will have on choices made in the future, and what impact the sum of these choices will have upon the total resources of the judiciary.

One additional standard for evaluating a particular proposal for changing the terms of the "senior judge" option is whether it is fair both to the group and to individual judges within the group -- all of whom will have served at least 10 years in office, most of whom will have served substantially longer, and many of whom will have served 20 years or longer, a period often treated in other retirement systems for public employees as a term entitling the employee to a full pension and an entitlement to COLAs (or comparable protection against inflation by funding and an entitlement to the proceeds of investment).

Of course, no other retirement system exactly like that for Article III judges is in existence. Comparisons nevertheless

establish that a very large percentage of the "salary of office" as it may be expected to be in future years would be appropriately attributable to a reasonable "retirement benefit" or "pension equivalency." Indeed, for many judges with long years of service the entire amount of the "salary of office" would turn out to be less than a normal pension for a comparable period of service under public and private pension systems.

Both in public [check this for accuracy] and in private employment, pension systems are sometimes "noncontributory." That is, rather than paying the employee a stated salary plus fringe benefits that include an employer contribution to a pension fund, and also requiring that the employee make a contribution (as is required under the Social Security system, for example), the system may be one under which the employer makes the full contribution to a funded pension system and the employee makes none. As a matter of bargaining between employer and employee, where bargaining is possible in fact, both may prefer such a system because the income tax that the employee will owe based on amounts contributed by the employer into the pension fund will be deferred until the payout period (as are, also, income taxes based on the amounts earned on investment of the contributed funds).

Thus, the fact that an Article III judge does not formally make a contribution to a pension fund does not mean that he or she has not through years of public service earned an entitlement to what this paper refers to as "pension equivalency benefits." This point is underscored by the comparison that some



law schools pay professorial salaries that are higher than the "salary of office" of Article III judge, together with exactly the kind of fringe benefit just stated by way of illustration -- that is a noncontributory system.

Moreover, such a funded system of retirement benefits has built into it a substantial protection against inflation. TIAA-CREF contracts illustrate the point. The Teachers Insurance Annuity Association and College Retirement Equities Fund provide many options, at the choice of the annuitant, for investment of the retirement fund accumulated on behalf of the individual. In every form of investment offered, the return from investment is expected to exceed the rate of inflation, and over the four decades of its operations has done so to a very substantial extent. For example, TIAA investments typically produce a return several percentage points above the rate of inflation.

The significance of this protection against inflation is illustrated by the following table.



INCOME NEEDED DURING RETIREMENT  
TO BUY WHAT \$10,000 BUYS AT THE START OF RETIREMENT

Number of years after the start of retirement	Inflation Rate				
	2%	4%	6%	8%	
5	\$ 11,041	\$ 12,167	\$ 13,382	\$ 14,693	For example, assume inflation averages 4% a year for the first 10 years of your retirement.
10	12,190	14,802	17,908	21,589	This means you would need \$14,802
15	13,459	18,009	23,966	31,722	at the end of the 10th year to
20	14,859	21,911	32,071	46,610	buy the same items you bought
25	16,406	26,658	42,919	68,485	for \$10,000 in your first year.

TIAA-CREF, Understanding Your Annuity Benefits Report, Feb. 1989.

Because no retirement fund is established by the government to assure "pension equivalency" for elderly judges, they have no protection against the risks of inflation illustrated by this Table.

Public sector pension systems, even when partially funded by contributions of the employee, typically pay pensions that include the equivalent of a contribution by the employer far above the employee contribution. [Data on military service pensions may be added here, if available.]

When all these facts about pension systems in public and private employment are taken into account, it becomes clear that every federal judge who is eligible for the senior judge option has accumulated a fair entitlement to a "pension equivalency." The judges who have the least such "pension equivalency" are those who entered the office of Article III judge at age 60 or later and thus became eligible for the senior judge option at age 70 or later. Even for this group (which is a small percentage of the total of

eligible judges), the "pension equivalency" is substantial, and it increases with each year of additional judicial service. For the greater number of judges with longer judicial service, the "pension equivalency" earned is higher and, in many instances, by standards used in public and private systems, reaches a level in excess of the "salary of the office" of Article III judge, both as it now is and as it may reasonably be expected to become in the future.

An illuminating perspective on what has been called "pension equivalency" in this memorandum was advanced in Judge Coffin's statement of April 27, 1989 (though he did not use this terminology):

To begin our own analysis of fairness and impact, we must recognize that the overwhelming majority of those few senior judges who today are not doing any judicial or administrative work have reached that condition only as they approach their ninth decade of life. They have gratuitously given the nation from 5 to 24 years of judicial service beyond the time when they were obliged to serve. Moreover, these elderly judges are the core group of those who have suffered the full bite of the pay erosion since the first effort at reaching an equitable compensation level in 1969. Their very real diminution of income through inflation has been \$509,515 over the past two decades. This is the difference between their actual pay and what they would have received if they had received inflation-prompted increases in the same manner as civil service personnel generally. If we calculate the indebtedness at 5 percent interest, compounded, we must conclude that the nation is in debt to these judges in the amount of \$811,246.77. Compounded at 10 percent, the loss would be \$1,266,429.27. Appendix G documents these computations.

Appendix 3, pp. 30-31, and Appn. G thereto.

To complete the picture of expected choices, of course one must take account of the incentives of choice as they would appear not to the hale and hearty judge -- discussed above -- but to the judge who, even at the time of choice, was already immediately concerned about failing health. Chief Judge Charles Clark addressed this point in a comment upon a proposal that would change the conditions of the senior judge option so that a senior judge would receive the benefit of salary increases only upon satisfying annually, and without interruption, a defined quantity of judicial work.

The call for a change providing that those who won't or can't work should not share in increases has a false allure. It has a ready appeal to those who don't understand why this option is available. ... [A] lawyer who is asked to pledge his life to judicial work is entitled to insist that Congress stay with the agreement made when he took the job. If Congress now gives signals they might change the rules, that judge will probably just stay in active status. If many do this, the results will be disastrous. Lifetime tenure is expressed in terms of good behavior, not freedom from the effects of aging. We could wind up with the best behaved bunch of seniles in the nation if Congress starts tinkering with the way a judge can retire.

Appendix 3, p. 30.

[More comparisons to follow when data become available.]

Another relevant inquiry about fairness both of the present system and of proposed changes concerns whether it is fair among the individuals who have come into the position of Article III judge at quite different ages and have quite different lengths of service. Again, as stated at the outset of part V, this paper does not address the complaint that for some or all of the group the compensation, whether viewed as "pension equivalency" or as compensation for current performance, should be higher because the "salary of office" has as a practical matter been diminished by inflation to less than it should be. The remaining question is whether a modification of the senior judge option that placed the compensation for some or all senior judges at something below the current "salary of office" would be unfair to some senior judges, and especially to those who had given long years of service and thus had earned a higher "pension equivalency" than others, by any standard of fairness that might be applied.

For example, consider a judge who entered the office of Article III judge at age 40, took senior status at age 65, continued to carry a 2/3 workload to age 80 (thus having given the equivalent of 35 full years of service), then became disabled for a year by a serious temporary illness, and thereafter resumed work at a 1/2 load at 81. If a changed set of option conditions precludes this judge from receiving COLAs in the "salary of office" in the 81st and later years because the continuity of his or her service was interrupted by the illness in the 81st year, he or she is treated very unfairly -- quite apart from the possibility that

such conditions cannot pass constitutional standards concerned both with protection of individual rights and with independence of the Third Branch.

It seems unnecessary to dwell on the unfairness of option conditions that would produce this result.

Another point to which this illustration calls attention is that any set of conditions that is premised on an assumed need for a threat to coerce senior judges to do some fixed measure of judicial work is (a) very demeaning to all judges and not merely to the small number, if there are any, whose behavior may have justified a sanction, and (b) is sure to operate unfairly unless the conditions for imposing the sanction are sensitive to the merits of the implicit charge that the judge has slacked off for unacceptable reasons.

If a system is to be adequately sensitive to these concerns, very likely it will need to designate some responsible decisionmaker who has power to determine the merits of the particular case, if the merits are in dispute, rather than relying on hard-and-fast bright-line measures. Thus, a more general point deserving special attention is that conditions that operate with bright-line precision must be fashioned with great care and sensitivity lest they produce unfairness in particular cases. When the conditions under consideration are to be applied to determine the rights of elderly persons who have given long public service, it is not enough that they will produce results that are appropriate and fair "on average" or "in general." They must be

designed both to serve the public interest and to be fair to the individuals to whom they will be applied.



#### **TABLE OF APPENDICES**

Appendix 1.....	Constitutional and Statutory Provisions Bearing on the Office of Senior Judge
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## A P P E N D I X 1

### Constitutional and Statutory Provisions Bearing on the Office of Senior Judge

Constitution, Art. I, Sec. 1

Constitution, Art. II, Sec. 2

Constitution, Art. III, Sec. 1

Consolidated Omnibus Budget Reconciliation Act of 1986,  
Public Law No. 99-272, section 12112

Ethics in Government Act, section 301(d) [What is U.S.C. citation?]

Social Security Act, section 209 (amended)

5 U.S.C. §8701(a)

28 U.S.C. §46(c)

28 U.S.C. §132(b)

28 U.S.C. §§294(b), (c), (d), (e)

28 U.S.C. §371(b), (c), (d)

28 U.S.C. §372(a)

28 U.S.C. §374

28 U.S.C. §454

28 U.S.C. §456

28 U.S.C. §620

28 U.S.C. §626

28 U.S.C. §§753(a), (g)

I.R.C. 3121(i)(5)

**A P P E N D I X 2**

**Judicial Conference Regulations and Directives**

**A P P E N D I X 3**

**Statement of Honorable Frank M. Coffin**  
**April 27, 1989**

**A P P E N D I X 4**

**Statement of Honorable Walter K. Stapleton  
April 27, 1989**

# Judicial Discipline

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**For Reference see: 1) Statements of A. Leo Levin and Abner J. Mikva, before the House Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary; and 2) Statement of Professor Stephen B. Burbank, before the House Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary.**



**Chancellor**  
**of the**  
**United States Courts**

CHANCELLOR OF THE  
UNITED STATES COURTS

Letters Submitted by

Daniel J. Meador, Chairperson  
American Bar Association Standing Committee  
On Federal Judicial Improvements

And

Chief Justice William H. Rehnquist

Summary

In 1986, the American Bar Association House of Delegates adopted a resolution recommending that Congress create a new high level administrative position for the federal judiciary, to be filled by a district or circuit judge. The ABA recommendation suggested that this new administrative position be assigned "such duties concerned with administering the federal judicial system as the Chief Justice may assign, including presiding over meetings of the Judicial Conference, chairing the Board of the Federal Judicial Center, making inter-circuit assignments of judges, and coordinating and directing research and long-range planning for the federal courts."

This conception was further discussed by a United States Judicial Conference Committee appointed by the Chief Justice to study the structure and workings of the United States Judicial Conference. That committee decided to defer the "chancellor concept" in favor of creating a strengthened Executive Committee of the Judicial Conference and a strengthened Chairman of that committee. The idea of establishing a chancellor was commented on recently by the Chief Justice, in response to an inquiry by Chief Judge Campbell on behalf of the Federal Courts Study Committee. The Chief Justice expressed no strong feelings on the subject but did make the following observations:

(1) If a chancellor position is established serious thought should be given to assigning to that position the duties imposed by statutes on the Chief Justice in relation to serving as a Regent of the Smithsonian Institution and a Trustee of several other museums and galleries,

(2) The relationship of a chancellor to the Administrative Office of the United States Courts and the Federal Judicial Center should be carefully considered, since the Chief Justice serves as Chairman of the Board of Directors of the Federal Judicial Center and appoints the Director of the Administrative Office.

### Recommendations

The ABA House of Delegates has recommended the creation of what has come to be termed a Chancellor for the United States Courts. The Chief Justice has expressed neither opposition nor support for this idea but has briefly commented on issues to be considered in connection with this matter.

### Comments

The idea of establishing a chancellor position which would deal with the functions noted in the ABA recommendation and could also represent the judiciary before Congress is one that merits further study. It would appear appropriate for the Federal Court Study Committee to propose that such a study be undertaken.

RECEIVED



MAY 12 1989

AMERICAN BAR ASSOCIATION

CHIEF JUDGE CAMPBELL

Standing Committee on  
Federal Judicial Improvements

1800 M Street, NW  
Washington, DC 20036  
(202) 331-2210

May 8, 1989

CHAIRPERSON

Daniel J. Meador  
Room 322  
University of Virginia Law School  
Charlottesville, VA 22901

Robert L. Chiesa  
95 Market Street  
Manchester, NH 03101

Frank A. Kaufman  
Suite 740  
United States Courthouse  
101 West Lombard Street  
Baltimore, MD 21201

Robert M. Landis  
3400 Centre Square West  
1300 Market Street  
Philadelphia, PA 19102

A. Leo Levin  
University of Pennsylvania Law School  
3400 Chestnut Street  
Philadelphia, PA 19104

James E. Noland  
Suite 304  
United States Courthouse  
46 East Ohio Street  
Indianapolis, IN 46204

Maurice Rosenberg  
Columbia University School of Law  
435 West 116th Street  
New York, NY 10027

Mary M. Schroeder  
Suite 6421  
United States Courthouse  
230 North First Avenue  
Phoenix, AZ 85025

Robert S. Thompson  
University of Southern California Law Center  
University Park  
Los Angeles, CA 90089-0071

BOARD OF GOVERNORS LIAISON

Joe Stamper  
112 North High Street  
Post Office Box 100  
Antlers, OK 74523

JUDICIAL ADMINISTRATION DIVISION  
LIAISON

Harold Barefoot Sanders, Jr.  
15th Floor  
1100 Commerce Street  
Dallas, TX 75242

YOUNG LAWYERS DIVISION LIAISON

William R. Bay  
Suite 3400  
One Mercantile Center  
St. Louis, MO 63101

STAFF LIAISON

Irene R. Emsellem  
American Bar Association  
1800 M Street, NW  
Washington, DC 20036  
(202) 331-2210  
ABA/NET: ABA 461

The Honorable Joseph F. Weis  
Chairman, Federal Courts Study Committee  
513 U.S. Post Office and Courthouse  
Seventh and Grant Streets  
Pittsburgh, Pennsylvania 15219

Dear Joe:

There are two items I would like to call to your attention as possibilities for the agenda of the Federal Courts Study Committee.

1. In 1986, the American Bar Association House of Delegates adopted a resolution recommending that Congress create a new high level administrative position for the federal judiciary. A copy of that resolution and the explanatory report are enclosed. I am not sure whether this item is embraced somewhere in your committee's agenda at this point, but I thought it is something that should not be overlooked and that you might want to know of the ABA's support for the idea. Incidentally, the book referred to in this report--The Office of Chief Justice--is being mailed to all members of your committee and to its staff, as the result of a conversation I had recently with Bill Slate.

2. The ABA Standing Committee on Federal Judicial Improvements met recently and spent considerable time discussing the various items on your committee's agenda. Judge Judith Keep joined the committee for dinner and gave its members the benefit of her understandings as to what the committee will be doing. In the discussion following her appearance, committee members reached a consensus that an item that does not at the moment appear to be on your committee's agenda should probably be added. That is the idea of recommending the creation of a permanent entity to engage in continual and long-range planning for the federal judiciary. Such a body should probably be an inter-branch body, which should also include persons from the bar and from the academic world. Some members of our ABA committee thought that such an entity should be housed in the judicial branch; other members thought that the more important point is that such an entity be

The Honorable Joseph F. Weis  
Page 2  
May 8, 1989

created, with its particular location in the government being a matter of secondary concern. In any case, I pass along this item for possible inclusion in your committee's agenda.

Inasmuch as both of these items may fall within the concerns of Judge Levin Campbell's subcommittee, I am sending him a copy of this letter. With best wishes,

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Meador', with a stylized flourish at the end.

Daniel J. Meador

DJM:kbb

cc: Chief Judge Levin Campbell  
Mr. William K. Slate, II  
Ms. Irene Emsellem

*Approved  
House - voice*

AMERICAN BAR ASSOCIATION  
STANDING COMMITTEE ON  
FEDERAL JUDICIAL IMPROVEMENTS  
REPORT TO THE HOUSE OF DELEGATES  
RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that Congress create a new administrative position within the federal judiciary to be filled by a district or circuit judge, in either active or senior status, to be designated by the Chief Justice, to perform such duties concerned with administering the federal judicial system as the Chief Justice may assign, including presiding over meetings of the Judicial Conference, chairing the Board of the Federal Judicial Center, making inter-circuit assignments of judges, and coordinating and directing research and long-range planning for the federal courts. |

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REPORT

The office of Chief Justice of the United States was created by Congress in the Judiciary Act of 1789, which established the federal court system. From that time forward the Chief Justice has served as one of the judges of the Supreme Court and also as its presiding officer. Until the 20th century the Chief Justice had no other responsibilities of any magnitude. As the federal judicial system grew, however, the Chief Justice gradually assumed responsibilities for its system-wide



administration. Some of these responsibilities were placed upon him by Congress; others fell to him by default because there was no other official in the federal judiciary to perform them.

The system-wide administrative responsibilities of the Chief Justice have today become enormous as the result of the large growth in the court system. The system has expanded in every respect significantly over the last twodecades. Today there are 226 authorized circuit judges and 758 authorized district judges sitting in the immense territory stretching from Maine to Hawaii and from Puerto Rico to Alaska. The federal judiciary employed as of June 30, 1985, a total of 17,542 persons. Three different bodies created by Congress seek to perform various administrative tasks for the system: the Administrative Office of the United States Courts, the Federal Judicial Center, and the Judicial Conference of the United States. Other than the Chief Justice, there is no official in position to coordinate their work. There is a total of 52 different statutory enactments assigning non-adjudicative duties to the Chief Justice.

Among the responsibilities which the Chief Justice must discharge, in addition to serving full-time as a Justice on the Supreme Court participating in all of its adjudicative business and serving as the Supreme Court's administrator, are these: presiding over the two annual meetings of the Judicial Conference of the United States; appointing and coordinating the work of the 25 committees of the Judicial Conference; chairing the Board of Directors of the Federal Judicial Center; making intercircuit assignments of federal judges; designating judges to sit on special statutory courts; serving as Circuit Justice for the District of Columbia Circuit and the Fourth Circuit; developing and approving the annual budget for the federal courts to be submitted to Congress; and, in general, serving as the head of the federal judiciary as its chief nationwide administrative and judicial officer. When one considers that the demanding work of each of the eight Associate Justices in passing on certiorari petitions, participating in the Court's conferences, hearing oral arguments, and writing opinions occupies their full time, it becomes clear that the additional, system-wide responsibilities of the Chief Justice impose burdens on the office that place extraordinary strains on its occupant. Persons who have studied the problem in recent years have concluded that the office of Chief Justice is badly overburdened and that assistance is needed in connection with the administrative, managerial, and planning work for the federal judicial system as a whole.

Chief Justice Burger himself articulated the need for such assistance in an address made in December, 1978 before the American Enterprise Institute. In January, 1985, he repeated the need for a new high-level administrative position in the federal judiciary to handle these administrative problems. 71 ABA Journal 93 (1985). A conference of judges, court administrators, and academicians held in October, 1982 at the White Burkett Miller Center of Public Affairs at the University of Virginia elicited views to the same effect. Published writings have also described the inordinate administrative burdens on the office of Chief Justice and have recommended that Congress provide some assistance to the system. See Fish, The Office of Chief Justice (in The Office of Chief Justice, White Burkett Miller Center of Public Affairs, University of Virginia, 1984); Meador, The Federal Judiciary and its Future Administration, 65 Va. L. Rev 1031 (1979); Morrison, Stenhouse, Scott, The Chief Justice of the United States: More than Just the Highest Ranking Judge, 1 Constitutional Commentary 57 (1984).

Because some of these administrative duties involve quasi-judicial functions and because a person in this position needs the respect of federal judges, the Congress, and the public, it is desirable that the person holding this position be an Article III judge. The best solution is a congressional enactment creating a new high-level position to be filled by a district or circuit judge (in either active or senior status) to be designated by the Chief Justice for a stated period of time (perhaps 5 years), but subject to removal at any time by the Chief Justice. This administrator would be responsible directly to the Chief Justice, who would remain the titular head of the federal judiciary.

The functions to be performed by this new officer could include, for example, presiding over meetings of the Judicial Conference, appointing committees of the Judicial Conference, chairing the Board of the Federal Judicial Center, supervising the work of the Administrative Office, making inter-circuit assignments of judges, preparing the annual budget for the courts, coordinating long-range planning for the needs of the judiciary, and communicating with Congress through testifying at committee hearings and otherwise as to the needs of the judiciary. In addition to relieving the Chief Justice of these substantial administrative chores, the new officer would also provide

for the federal judicial system something that it does not now have, namely, a long-range planning mechanism -- a means through which the needs of the courts and the trends at work in the country, insofar as they affect the courts, could be projected and proposals developed to equip the courts to meet future demands.

Accordingly, the Standing Committee on Federal Judicial Improvements recommends that the American Bar Association endorse the creation of such a new, high-level position in the federal judiciary to be held by an Article III judge designated by the Chief Justice.

Respectfully submitted,

Robert L. Chiesa  
Leonard H. Gilbert  
Herbert E. Hoffman  
Sam D. Johnson  
Daniel J. Meador  
James E. Noland  
Dorothy Comstock Riley  
Irving R. Segal  
Robert M. Landis, Chairman

February, 1986  
1287b

General Information Form

To Be Appended to Reports with Recommendations

No. \_\_\_\_\_  
(Leave Blank)

Submitting Entity Standing Committee on Federal Judicial Improvement:

Submitted By Robert D. Evans, Staff liaison

1. Summary of Recommendation(s).

That the Association support creation of a new position within the federal judiciary to perform such duties concerned with administering the federal judicial system as the Chief Justice may assign.

2. Approval by Submitting Entity.

The Standing Committee approved this recommendation for submission to the House of Delegates at the Standing Committee's November 13-14, 1985 meeting.

3. Background. (Previous submission to the House or relevant Association position.)

None.

4. Need for Action at This Meeting.

The Chief Justice and numerous scholars have pointed out the desirability of creating such a position so that the office of the Chief Justice will not bear the sole responsibility for system-wide administration of the federal courts.

5. Status of Legislation. (If applicable)

None.

6. Financial Information. (Estimate of funds required, if any.)

None.

7. Conflict of Interest. (If applicable)

None.

8. Referrals.

Standing Committee on Federal Judiciary  
Standing Committee on Judicial Selection, Tenure and Compensation  
Section of Criminal Justice  
Section of General Practice  
Section of Individual Rights and Responsibilities  
Judicial Administration Division  
Appellate Judges' Conference  
Lawyers' Conference  
National Conference of Federal Trial Judges  
Section of Litigation  
Section of Tort and Insurance Practice  
Young Lawyers Division

9. Contact Person. (Prior to meeting)

Robert M. Landis, Chairman, and  
Prof. Daniel J. Meador

10. Contact Person. (Who will present the report to the House)

Robert M. Landis, Chairman, and

# Federal Judicial Center



## **FEDERAL JUDICIAL CENTER**

### **Letters Submitted by**

**Judge John C. Godbold**  
**Director, Federal Judicial Center**  
**and**  
**Judge William C. O'Kelley**  
**Member, Board of Directors, Federal Judicial Center**

### **Summary**

It has been suggested by various Federal Courts Administrators that consideration should be given to merging the Federal Judicial Center with the Administrative Office of the United States Courts. Some believe that this would reduce the combined operating cost of those two entities and would give the Federal Judicial Center a greater understanding of the operational needs of the federal judiciary. There is a strong sentiment among some court administrators that the Federal Judicial Center is too far removed from the day to day reality of federal court operations. In his letter, Judge Godbold strongly opposes any merger. He believes that absent its independent status, the Federal Judicial Center "could not meet its statutory obligations to examine federal court operations generally and to meet present recommendations for improvement to the Judicial Conference, the Congress, other government departments and private agencies". Judge Godbold makes a strong case for the position that the Federal Judicial Center's independence has allowed it to undertake "frank and impartial examination" of the workings of the courts. Judge Godbold points out that the Center's independence gives integrity to its work and gives to it the confidence of those who rely upon it.

In his letter, Judge Godbold also expresses concern over the decline in resources available for education, research and systems development services. Judge Godbold also expresses concern over the limited nature of orientation training in the federal judiciary.

In his letter, Judge O'Kelley expresses support for Judge Godbold's opposition to a merger of the Federal Judicial Center with the Administrative Office.

### **Recommendations**

Judge's Godbold and O'Kelley both recommend that the Federal Judicial Center be continued as an independent body. Judge Godbold suggests that there is a need for increased resources and greater orientation training.

#### Comments

The issue of the merger of the Federal Judicial Center and the Administrative Office of the United States Courts is one we do not believe needs to be addressed by the Federal Courts Study Committee. However, it is suggested that the Federal Courts Study Committee might wish to make a statement in support of increased funding for education, research and training.

THE FEDERAL JUDICIAL CENTER  
DOLLEY MADISON HOUSE  
1520 H STREET, N.W.  
WASHINGTON, D.C. 20005

OFFICE OF  
THE DIRECTOR

May 30, 1989

TELEPHONE  
202/633-6311

RECEIVED

JUN 5 1989

CHIEF JUDGE CAMPBELL

Honorable Levin H. Campbell  
Chairman, Structure Subcommittee  
1618 John W. McCormack Post Office  
and Courthouse  
Boston, Massachusetts 02109

Dear Judge Campbell:

I write in my capacity as Director of the Federal Judicial Center to offer three matters for the consideration of your subcommittee tasked, among other things, with examining FJC operations. Generally, I believe the FJC is operating efficiently and effectively and that it is providing valuable education, research and development services to the federal judiciary. The greatest impediment to more effective FJC operations is lack of resources.

(1) Independence of the FJC:

I understand that two circuit executives have suggested that your subcommittee consider whether the FJC should be merged with the AO. I am convinced that it should not. There are at least two central reasons.

First, there is an inevitable tension between the immediate operational needs of the judiciary and its concomitant needs for education, research and long-range planning and policy development. Within large organizations, including the judiciary, in times of fiscal crisis there are predictable pressures to defer the latter services to satisfy day-to-day operating needs, regardless of the eventual negative consequences of such action. Indeed, the FJC was created in part to respond to this very tension. We have seen this tension between R&D and operations appear in recent years. When it appeared that Gramm-Rudman-Hollings would cause funds to be unavailable to pay jurors, more than one judicial voice (from judges who did not understand that the FJC budget is separate from that of the AO) suggested that FJC funds be utilized for jurors' pay. The other side of the coin is that, because of its independence, and its separate congressionally provided budget, the FJC is able to meet training and planning needs of the courts without adversely affecting funds needed to satisfy the operational demands of the courts.

Second, absent its independent status the FJC<sup>1</sup> could not meet its statutory obligations to examine federal court operations generally and to meet present recommendations for improvement to the Judicial Conference, the Congress, other government departments and private agencies.<sup>1</sup> In a single organization

there would be pressures to speak with a single voice. Frank and impartial examination requires independence. The Center has operated with a spirit of responsible independence, and indeed has prided itself upon it. This independent neutrality gives integrity to the Center's work and draws to it the confidence of those who rely upon it.

(2) Declining Funds for Education and Research:

I am concerned that the funds available for research and development in the federal judiciary have not kept pace with its growth. I will use the resources available to the FJC for purposes of illustration.

During the past decade, the number of judicial officers to whom the FJC is obligated to provide education, research and systems development services has increased substantially--from 14,011 in 1980 to 22,300 in 1989--while during this same period the authorized staff of the FJC has actually declined by almost 20 percent, from 117 in 1980 to 96 in 1989. Similarly, the FJC's budget as a percentage of the judiciary's budget has been cut almost in half during the past decade. In 1989 it was less than 1 percent (8/10 of 1 percent to be exact).

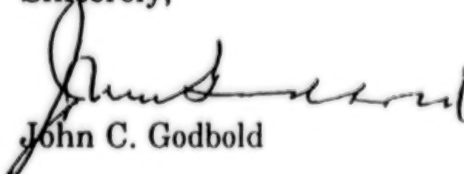
Because of the steady increase in those to be served, and the steady decline in resources to provide education, research and systems development services, the FJC is today unable to meet all of the judiciary's needs. This decline in resources for education, research and systems development services needs to be reversed.

(3) Orientation Training:

The FJC staff believe that orientation programs for judges, magistrates and senior court managers should be expanded. I agree. For example, new district judges now receive a four day regional orientation course followed by an intensive one week course at the Dolley Madison House. This limited orientation training does not accord with the demands of the position and the length of tenure most serve. New senior court managers now receive no specific orientation training for their new positions. They must learn what they can from their colleagues and, for some, from the FJC's workshops and seminars for experienced managers. In this regard, the judiciary lags behind the executive branch. Presently we are developing programs for new chief judges, but funds to support this training must be diverted from other training.

I appreciate the opportunity to present these views for the consideration of your subcommittee. Please let me know if you would find additional information useful.

Sincerely,



John C. Godbold

JCG:ps

cc: The Chief Justice  
FJC Board Members

531

# **Space and Facilities Issues**



**INDEPENDENT REAL PROPERTY AUTHORITIES  
FOR THE FEDERAL JUDICIARY**

Submitted by  
  
**Space and Facilities Committee  
of the  
Judicial Conference**

**Summary**

The United States Courts have experienced increasing difficulties in acquiring and maintaining court accommodations. These difficulties stem in large part from statutory requirements forcing the courts to depend on the General Services Administration (GSA) to provide for all their space needs. In order to remedy this situation, legislation has been proposed for the enactment of the Judicial Space and Facilities Management Improvement Act of 1989. This Act would fundamentally alter the relationship between the Administrative Office of the Courts (AO) and the GSA. Under this proposal, the AO would acquire the statutory authority and the financial capability to provide and maintain court accommodations independent of GSA, thereby enabling the Courts to satisfy their space requirements when GSA is unable or unwilling to do so.

The present authority of the AO with respect to real estate matters is quite limited. The AO is charged with the responsibility for providing accommodations for the courts. In addition, the AO is responsible for disbursing money appropriated for the maintenance and operation of the courts. Nevertheless, while the AO is charged with these responsibilities, the AO lacks the statutory authority to carry them out independently. Thus the AO lacks the authority to acquire or construct space for courthouses and lacks independent authority to lease space. It must rely entirely on GSA as its intermediary in all such instances.

As the landlord for the federal government, GSA is provided broad contracting and funding authority with respect to real property. GSA's statutory authority includes the authority to acquire buildings and sites, to alter public buildings, to acquire lands for public buildings, to construct buildings and to exchange or sell building sites. In addition, GSA is authorized and directed to provide court accommodations at the request of the AO and upon approval of the Judicial Conference.

GSA charges the Courts for space and services at prevailing commercial rates. The difference between GSA's actual costs and the rates charged the Courts (estimated by GSA staff to be one-third the rate charged to the Courts) is kept in the Federal Buildings Fund and may be applied towards any federal projects for which funds from the Federal Building Fund are authorized and expended.



In recent years, GSA has been faced with increasing demands on the Federal Buildings Fund and severe budgetary constraints. Consequently, GSA has been increasingly unable to meet the space requirements of the Courts. At the present time, it is estimated that it takes up to three to four years before a new judge, once confirmed, will be able to occupy his/her own courtroom and chamber. In addition, GSA has been forced to defer maintenance work in existing facilities, thereby resulting in deteriorating systems.

The Judiciary also has very little control over capital expenditure projects. If the Judiciary were to request that GSA construct a new courthouse, the project would have to be approved by GSA as well as by the Office of Management and Budget. It would then be necessary for GSA to obtain authorization for this project through the prospectus process from the Public Works Committees in the House of Representatives and the Senate.

The proposed legislation would sever the AO's dependency on GSA. It would allow the AO to contract, lease and otherwise manage the judiciary's space needs. Implementing this proposal should have a minimal impact on the resources of the Judiciary. It is anticipated that the additional resources needed by the Judiciary to carry out the additional responsibilities will be funded within the general level of funding now appropriated to the Judiciary for "rental payments" to GSA since only two-thirds of the Judiciary's annual rental payments represents actual costs. Although the cost of new construction is a potential major expense, the proposed legislation provides for authority to construct new facilities through a public-private sector partnership as is now done by GSA on an ad hoc basis. Under such an arrangement, a private developer would finance, design, and construct a facility to the specific requirements of the Judiciary. The total costs would be spread over a 15 to 30-year lease, with the Judiciary acquiring title to the facility at some point in the lease-relief.

#### **Recommendations**

The Committee on Space and Facilities requests that the Federal Courts Study Committee endorse the proposed legislation in its report to the Congress.

#### **Comments**

This proposal will be presented for approval to the Judicial Conference when it meets in Washington, D.C. on September 20 - 21. Assuming, as seems likely, that the Conference approves, it is recommended that the Federal Courts Study Committee include a statement in its report strongly supporting the proposed legislation.

# Federal Courts Study Committee

22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, PA 19106-1722

Judge Joseph F. Weis, Jr.  
Chairman

Telephone: 215-597-3320  
Facsimile: 215-597-3350

William K. Slate, II  
Director

August 4, 1989


J. Vincent Aprile, II  
Judge Jose A. Cabranes  
Chief Justice Keith M. Callow  
Chief Judge Levin H. Campbell  
Edward S. G. Dennis, Jr.  
Senator Charles E. Grassley  
Morris Harrell  
Senator Howell Heflin  
Congressman Robert W. Kastenmeier  
Judge Judith N. Keep  
Professor Rex E. Lee  
Congressman Carlos J. Moorhead  
Diana Gribbon Motz  
Judge Richard A. Posner

The Honorable Robert S. Vance  
United States Circuit Judge  
900 United States Courthouse  
Birmingham, Alabama 35203

Dear Judge Vance:

Thank you very much for the issue paper prepared by the Space and Facilities Committee of the Judicial Conference. I will forward a copy of this report to each member of the Federal Courts Study Committee and call special attention to the subcommittee on structure chaired by Chief Judge Levin Campbell. I believe that the contents of your report will be a subject of discussion at the next meeting of the Committee scheduled for September 18, 1989.

Sincerely,

  
Joseph F. Weis, Jr.

cc: Hon. Stanley S. Brotman  
Chief Judge Levin Campbell  
Members of the Federal Courts Study Committee

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AUG 7 1989

CHIEF JUDGE CAMPBELL

585

UNITED STATES COURT OF APPEALS  
ELEVENTH JUDICIAL CIRCUIT

ROBERT S. VANCE  
UNITED STATES CIRCUIT JUDGE  
900 UNITED STATES COURTHOUSE  
BIRMINGHAM, ALABAMA 35203

July 31, 1989

Honorable Joseph E. Weis, Jr.  
Chairman, Federal Courts Study Committee  
513 U.S. Post Office & Courthouse  
7th & Grant Streets  
Pittsburgh, Pennsylvania 15219

Dear Judge Weis:

The enclosed issue paper reflects the concern of the Space and Facilities Committee of the Judicial Conference that the problems encountered by the Judiciary in obtaining facilities in a timely manner are systemic -- caused more by the involvement of the Office of Management and Budget on behalf of the Executive Branch in setting budgetary priorities for the General Services Administration, and consequently for the Judiciary, rather than solely caused by the GSA's inability to perform its functions for us. The Committee believes that the only long-term solution to the situation is to provide for the Judiciary a direct relationship with the Congress in deciding what projects and at what costs are needed for the Judiciary to carry out its Constitutional responsibilities as a separate branch of government.

It seems to the Committee that in order to provide such a direct relationship with the Congress in the space and facilities area as currently exists in all other aspects of the Judiciary's administration we must first have the statutory authorities needed to carry out an independent real property program. The enclosed issue paper includes a draft bill, the Judicial Space and Facilities Management Improvement Act of 1989 to that end, including the establishing of a Judiciary Buildings Fund into which funds for the space and facilities program could be appropriated. The Committee has asked the approval of the Judicial Conference to proceed with finding sponsors to introduce the legislation and to marshal the persuasive forces of the Judiciary to have it favorably considered by the Congress.

We would very much like to have the Federal Courts Study Committee's recognition of the seriousness of the problem and to add its endorsement to the weight of our arguments for the necessity of such legislation as a step in correcting the problem.

Honorable Joseph F. Weis, Jr.  
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Thank you very much for your consideration. Please contact me or District Court Judge Stanley S. Brotman of Camden, New Jersey, who serves as Chairman of the Subcommittee on Relations with the GSA, if we may provide further information.

Sincerely,

  
Robert S. Vance, Chairman  
Space and Facilities Committee

Enclosures

**COPY OF PROPOSED  
LEGISLATION**

**JUDICIAL SPACE AND FACILITIES  
MANAGEMENT IMPROVEMENT ACT OF 1989**

# INDEPENDENT REAL PROPERTY AUTHORITIES FOR THE FEDERAL JUDICIARY

## INTRODUCTION

The United States Courts are currently experiencing increasing difficulties in acquiring and maintaining court accommodations in a timely and efficient manner. As explained below, these difficulties stem in large part from the statutory and financial constraints under which the courts must operate. As a result, this proposal sets forth a draft of a proposed Judicial Buildings Act which would fundamentally alter the relationship between the Federal Judiciary and the General Services Administration (GSA), the landlord for the federal government. Under this proposal, the Judiciary would acquire the statutory authority and the financial capability to provide and maintain courtroom accommodations independent of GSA, thereby enabling the Judiciary to satisfy its space requirements when GSA cannot do so.

This proposal represents a draft of the proposed legislative program and is intended to stimulate further discussion regarding appropriate measures to alleviate the current problems facing the courts in this area.

## OVERVIEW OF CURRENT SITUATION

The authority of the Judiciary with respect to real estate matters is quite limited. The Director of the Administrative Office of the U.S. Courts is charged with the responsibility for providing accommodations for the courts, the offices providing pretrial services, and the clerical and administrative personnel (28 U.S.C. § 604(a)(12); see also 28 U.S.C. § 462). The Director is also responsible for disbursing money appropriated for the maintenance and operation of the courts (28 U.S.C. § 604 (a)(8)). In addition, the Judiciary is required to submit to the Office of Management and Budget (OMB) "annual estimates of the expenditures and appropriations necessary for the maintenance and operation of the courts. . . ." (28 U.S.C. § 605).

While the Director is charged with the various responsibilities discussed above, the Judiciary lacks the statutory authority to carry out these responsibilities independently. For example, the Judiciary lacks the authority to acquire or construct space for courthouses and lacks independent authority to lease space. The Judiciary further lacks the general contracting and procurement authority which is granted to GSA.

In contrast to the Judiciary, GSA is provided broad contracting and funding authority with respect to real property. Under the Public Buildings Act of 1959, 40 U.S.C. § 601, et. seq., "No public building shall be constructed except by the Administrator, who shall construct such building in accordance with this chapter." "Public building" is defined in 40 U.S.C. § 612 as including courthouses. GSA's statutory authority includes the authority to acquire buildings and sites (section 602), to alter public buildings (section 603), to acquire lands for public building sites (section 604), to construct buildings (section 605), and to exchange or sell building sites (section 605). In addition, under 28 U.S.C. § 462(f), GSA is authorized and direct to provide court accommodations at the request of the Director of the Administrative Office and upon approval of the Judicial Conference of the United States. This latter section will likely need to be amended in order to require GSA to provide the accommodations requested by the Administrative Office (AO) where the AO chooses to rely on GSA to provide facilities.

The procedures for Congressional approval of proposed GSA projects are set forth in 40 U.S.C. § 606. Under the recent amendments to the Public



Buildings Act, GSA is required to submit a prospectus to Congress for projects which involve a total expenditure in excess of \$1,500,000. In addition, GSA is required to obtain prospectus approval for any alterations to leased space if the cost of such alterations would exceed \$750,000. Significantly, GSA is now precluded from leasing space to accommodate a permanent courtroom, judicial chamber, or administrative office for any United States Court if the average rental cost of leasing such space would exceed \$1,500,000, unless GSA certifies that such space cannot be accommodated in public buildings.

As the landlord for the federal government, GSA is authorized under 40 U.S.C. § 490 and 41 C.F.R. Part 101-21 (Federal Buildings Fund) to charge other agencies for space provided by GSA. Consistent with the Federal Buildings Fund regulations, GSA currently charges the Courts for space and services, a user charge which approximates commercial charges for comparable space and services (41 C.F.R. § 101-21.002). Thus, GSA charges the Courts for space and services at prevailing commercial rates, although these rates will generally exceed the actual cost to GSA of providing such space and services. The difference between GSA's costs and the rates actually charged the Courts (estimated by GSA staff to be one-third the rate charged to the Courts) is kept in the Federal Buildings Fund and may be applied towards any projects for which funds from the Federal Buildings Fund are authorized to be expended.

Under the Buildings Funds regulations, GSA provides the Judiciary with a projected bill covering the standard level user charges for Court space and services. The Judiciary obtains appropriations each year to cover this projected bill from the Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Subcommittees. These funds are paid to GSA and placed in the Federal Buildings Funds. GSA is then responsible for maintenance of Court space out of this Fund, as well as for additional alteration or construction projects completed to "commercially equivalent" standards, but the Judiciary reimburses GSA separately for the costs of constructing the jury box, witness box, judges bench, and spectator seating in courtrooms as well as other items.

Under the present system, the Judiciary has little control over capital projects. For example, if the Judiciary were to request that GSA construct a new courthouse, the project would have to be approved by GSA as well as by OMB. It would then be necessary for GSA to obtain authorization for this project through the prospectus process from the Public Works Committees in the House of Representatives and the Senate.

As explained in the report of the National Academy of Public Administration (NAPA) entitled "Improving Facilities Management For The U.S. Courts." [copy enclosed] the combination of the statutory framework discussed above and recent factual developments have created a situation which clearly requires modification. Specifically, since 1977, there has been a 50 percent increase in the number of judges and magistrates. During this same period, GSA, which is responsible for providing courtroom and office space for these judges, has been faced with increasing demands on the Federal Buildings Fund and severe budgetary constraints. As a result, GSA has been increasingly unable to meet the space requirements of the Courts. For example, at the present time, it is estimated that it takes up to three to four years before a new judge, once confirmed, will be able to occupy his/her courtroom and chamber (NAPA Report at page 10). In addition, GSA has been forced to defer maintenance work in existing facilities, thereby resulting in deteriorating systems (NAPA Report at 17).

A recent NAPA survey conducted for the Courts at the request of the Judiciary, examines the real property authorities of a number of Federal entities, both within and outside of the Executive Branch. It shows, for example, that the Congress, another independent Branch of Government, is totally independent of the Executive Branch in carrying out its real property functions, as is the U.S. Postal Service and the Federal Reserve Board.

## OBJECTIVES OF LEGISLATIVE PROPOSAL

Consideration of the current system and problems suggests that is a legislative proposal is presented to Congress it must, at a minimum, seek to achieve the following specific objectives:

(1) The Judiciary must be able to set its own priorities with respect to capital projects independent of GSA and must be able to carry through on these priorities without being delayed by GSA;

(2) Funding for Judiciary capital projects must be appropriated separate from the GSA appropriation process and, as with other Judiciary appropriations, should not be subject to OMB review.

The proposed legislation should provide the Judiciary with discretionary authority with respect to attaining its required space needs. That is, the Judiciary should be able to determine whether to contract out for space or services or whether to obtain such space or services from GSA. This determination should be made by the Judiciary, however, not by GSA.

The proposed legislation anticipates that disputes may arise between GSA and the Judiciary regarding the most appropriate means for providing courtroom space. The proper forum for resolving such disputes is Congress through the appropriations and prospectus processes. Thus, GSA would be precluded from dictating future space decisions to the Courts.

## IMPLEMENTATION STRATEGY AND RESOURCE IMPACT

Implementing independent real property authorities should have a minimal impact on the resources of the Judiciary. It is anticipated that the additional resources needed by the Judiciary to carry out the additional responsibilities will be funded within the general level of funding now appropriated to the Judiciary for "rental payments" to GSA. GSA staff has estimated that approximately two-thirds of the Judiciary's annual rental payments (approximately \$225 million in 1989) is required to "reimburse" the GSA for direct and management costs for Judiciary-occupied space; the remaining third is used, along with rental payments for other tenants, to pay for capital improvements on the entire GSA-controlled federal space inventory. (Since the two-thirds/one-third ratio was developed by the GSA staff without participation by the Judiciary, it is possible that a more careful examination of actual expenses will result in an even larger portion of the annual budget being available for spending at the specific direction of the Judiciary.) In addition, on all reimbursable work, the Judiciary pays GSA an additional "management and inspection" fee. These fees would be retained in the Judiciary Buildings Fund and be subject to Judiciary control under the proposed legislation. The proposed legislation also would allow the Judiciary to pay GSA only actual expenses incurred for day-to-day building operations.

In the areas of project development, design, and construction, it is anticipated that most of the additional workload will be accomplished through contract staff -- even including the use of GSA or another Federal agency such as the U.S. Army Corps of Engineers, on a cost-reimbursable basis. Additional in-house staff would be limited to augmenting the capability to develop and administer such contracts.

In the area of facilities management, the Judiciary is a minor tenant in some two-thirds of the facilities it occupies; it is a sole tenant in only 20 or so facilities. For many reasons (security and management of space assignments within courthouses for expansion, for example) the Judiciary is pursuing a long-term strategy of housing Judicial activities in facilities designed as courthouses, and the number of sole-tenant facilities should increase over time. For the immediate future, the Judiciary will continue to

be a tenant of the GSA in most locations, and operation of courthouses, then, should not immediately require substantial increases in Judiciary staffing. Indeed, the costs for those facilities for which operations are assumed in the future should be offset by savings in paying rent to GSA for the operations.

There will be an increase in staffing to carry out the management responsibility for an independent program. For example, a Judiciary Buildings Fund will require additional financial management, accounting, and ADP resources and some contract resources; there will be an additional clerical support workload for all aspects of the enhanced program. Additional resources located geographically in the areas to be served will also likely be required for program management and coordination functions, e.g., in circuit executives offices to support the responsibilities of the Circuit Councils and in larger district courts with major facilities programs. However, these additional resources will likely be required regardless of obtaining independent real property authorities, since the Judiciary is considering separately the assignment within the Judiciary of responsibilities for a more vigorous space and facilities program. The additional program management, clerical, and enhanced Circuit Council and district court staffing can be funded within the present general budget for rent, alterations, and space-related activities.

In addition to staffing and contract resources, the costs of new construction is a potential major expense. the cost of constructing a new courthouse ranges presently between \$160 and \$200 per square foot of gross space. If the Judiciary were to be required to pay the total costs of a 200,000 square foot courthouse in a single budget year -- either from direct appropriation or from accumulated monies in the proposed Judiciary Buildings Fund -- it is quite unlikely that without the \$2 billion annual resources of the GSA's Federal Buildings Fund very many new courthouses would ever be built. However, the proposed legislation provides for authority to construct new facilities through a public-private section partnership as is now done by GSA on an ad hoc basis. Under such an arrangement, a private developer would finance, design, and construct a facility to the specific requirements of the Judiciary. The total costs would be spread over a 15 to 30-year lease, with the Judiciary acquiring title to the facility at some point in the lease-relief. [Congress has supported such arrangements in a number of specific instances, but the Executive Branch has refused to seek blanket authority for this alternative-- another example of the Executive Branch's policies adversely affecting the delivery of accommodations to the Judiciary.]

**DRAFT OF JUDICIAL  
SPACE AND FACILITIES MANAGEMENT IMPROVEMENT ACT OF 1989**

**Section 1: Short Title**

This Act shall be known as the Judicial Space and Facilities Management Improvement Act of 1989.

**Section 2: Definitions**

As used in this Act --

(1) The term "Director" means the Director of the Administrative Office of the United States Courts.

(2) The term "Administrator" means the Administrator of the General Services Administration.

(3) The term "court accommodation" includes (but is not limited to) chambers and courtrooms for all Courts of the United States (except the Supreme Court and the United States Court of Appeals for the Federal Circuit, and the Court of International Trade) as well as accommodations for all court-related functions and for probation officers, pretrial service officers, Federal Public Defender Organizations, the U.S. Sentencing Commission, the Administrative Office of the U.S. Courts, the Federal Judicial Center, and other administrative or clerical personnel associated with the Courts of the United States.

(4) The term "public building" is defined as set forth in section 612(1) of Title 40 of the United States Code.

(5) The term "facility" means any building or other structure, including its grounds, approaches, and appurtenances, or any part thereof.



(6) The term "space" means any interest, whether fee simple or otherwise, in real property, including land, buildings, structures, or parts thereof.

(7) The term "Federal agency" means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction).

(8) The term "executive agency" means any executive department or independent establishment in the executive branch of the Government including any wholly owned Government corporation and including (A) the Central Bank for Cooperatives and the regional banks for cooperatives, (B) Federal land banks, (C) Federal intermediate credit banks, (D) Federal home loan banks, (E) Federal Deposit Insurance Corporation, and (F) the Government National Mortgage Association.

(9) The term "alter" includes repairing, remodeling, improving, or extending or other changes in any space or facility.

(10) The terms "construct" and "alter" include preliminary planning, engineering, architectural, legal, fiscal, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other similar actions necessary for the construction or alteration, as the case may be, of any space or facility.

### Section 3: Authority Of Director

In order to carry out his duties under this Act and under Section 462 of Title 28 of the United States Code, the Director of the Administrative Office of the United States Courts shall be authorized to --

(a) acquire, by purchase, condemnation, exchange, or otherwise, any space or facility which he determines to be necessary for the provision of court accommodations;

(b) construct such facilities as he deems necessary for the provision of court accommodations;

(c) lease any space or facility as he deems necessary for the provision of court accommodations;

(d) alter any space or facility which is acquired under the authority of this Act as he deems necessary for the provision of court accommodations;

(e) dispose of any space or facility acquired or constructed by the Director as he deems necessary;

(f) acquire and exercise any option for the acquisition or lease of any space or facility as he deems necessary for the provision of court accommodations.

### Section 4: Architectural, Engineering Or Construction Services

The Director is authorized to employ, by contract or otherwise, the services of architectural, engineering, or construction firms, corporations, or individuals, to the



extent he may require such services for any space or facility authorized to be constructed or altered under this Act.

**Section 5: Operation And Maintenance**

The Director is authorized to employ, by contract or otherwise, the services of corporations, firms, or individuals for the operation and maintenance of any court accommodation, to the extent he may require such services.

**Section 6: Request For Space Or Services To Be Provided By The Administrator Of The General Services Administration**

(a) The Director may request that the Administrator of the General Services Administration provide, acquire, or maintain such court accommodations as may be required by the Courts of the United States. Upon such a request of the Director, the Administrator is authorized and directed to provide and maintain such court accommodations.

(b) Where court accommodations are provided by the Administrator in multi-tenant facilities, the Administrator shall give priority to providing court accommodations in contiguous space.

(c) Consistent with GSA regulatory requirements and leasing responsibilities, the Administrator shall endeavor to provide such reasonable alterations to court accommodations as shall be requested and financed by the Director under the authority of this Act.

(d) Upon consent of the Administrator of the General Services Administration, the Director may transfer

title or leasehold interest to any space or facility acquired by the Director under the authority of this Act to the Administrator for the provision or maintenance of court accommodations.

Section 7: Transfer Of Court Accommodations

(a) The Administrator shall not transfer, dispose of, or close any court accommodation without obtaining the prior consent of the Director.

(b) Upon obtaining the consent of the Director, the Administrator may transfer title or leasehold interest to any court accommodation to the Director.

Section 8: Approval Of Proposed Projects  
By Congress

(a) No appropriation shall be made to construct, purchase or acquire any space or facility to be used as a court accommodation which involves a total expenditure in excess of \$1,500,000 if such construction, purchase, or acquisition has not been approved by resolutions adopted by the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives, respectively. No appropriation shall be made to alter any space or facility, or part thereof, which is under lease by the Director for use as a court accommodation if the cost of such alteration would exceed \$750,000 unless such alteration has been approved by resolutions adopted by the Committee on Environment and Public

Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives, respectively. For the purpose of securing consideration for such approval, the Director shall transmit to Congress a prospectus of the proposed space or facility, including (but not limited to) --

- (1) a brief description of the space or facility to be constructed, altered, purchased, or acquired;
- (2) the location of the space or facility and an estimate of the maximum cost to the United States of the space or facility to be constructed, altered, purchased or acquired;
- (3) a statement by the Director that suitable alternative space already owned or leased by the government in proximity to the location chosen for such court accommodation is not available.

(b) No appropriation shall be made to lease any space or facility for a permanent court accommodation which involves an average annual expenditure in excess of \$1,500,000 if such lease has not been approved by resolutions adopted by the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives, respectively. For the purpose of securing consideration for such approval, the Director shall

transmit to the Congress a prospectus of the proposed space or facility including (but not limited to) the items set forth in paragraph (a) of this section and, in addition, a written statement by the Director setting forth the reasons why leasing such space or facility is necessary to meet requirements which cannot be met in public buildings.

**Section 9: Judicial Space And Facilities  
Management Fund**

(a) There is hereby established in the Treasury of the United States a fund into which there shall be deposited appropriations as determined by Congress and user charges obtained pursuant to section 11 of this Act.

(b) Moneys deposited into the fund shall be available for expenditure for space and facilities management and related activities in such amounts as determined by the Director, including (but not limited to) use for the following purposes:

- (1) acquisition of space and facilities for court accommodations;
- (2) lease of space or facilities for court accommodations;
- (3) construction or alteration of facilities for court accommodations;
- (4) maintenance of court accommodations;
- (5) management and overhead costs associated with the acquisition, construction, lease,

maintenance, or management of court accommodations.

(c) Moneys deposited into the fund shall also be available for reimbursement to the General Services Administration for court accommodations provided, altered, or maintained by the General Services Administration.

(d) The Director may maintain any appropriations unexpended at the end of the fiscal year in the fund to be expended on the provision or maintenance of court accommodations in succeeding fiscal years.

(e) Within sixty days after the close of the fiscal year, the Director shall provide the Appropriations Committees of the Senate and the House of Representatives with a detailed accounting of all expenditures from the Judicial Space and Facilities Management Fund and the amount of any unexpended funds, if any.

**Section 10: Lease Purchase Contracts**

(a) Whenever the Director determines that the best interests of the United States will be served by taking action hereunder, he is authorized to provide court accommodations by entering into purchase contracts, the terms of which shall not be more than thirty years and which shall provide in each case that title to the space or facility shall vest in the United States at or before the expiration of the contract term and upon fulfillment of the terms and conditions stipulated in each of such purchase contracts. Such terms and conditions

shall include provision for the application to the purchase price agreed upon therein of installment payments made thereunder. If any such contract is negotiated, the determination and findings supporting such negotiations shall be promptly reported in writing to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Proposals for purchase contracts shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the facility to be procured.

(b) Each such purchase contract shall include such provisions as the Director, in his discretion, shall deem to be in the best interests of the United States and appropriate to secure the performance of the obligations imposed upon the party or parties that shall enter into such agreements with the United States. No such purchase contract shall provide for any payments to be made by the United States in excess of the amount necessary, as determined by the Director, to --

- (1) amortize the cost of construction of improvements to be constructed plus the fair market value, on the date of the agreement, of the space, if not owned by the United States;



- (2) provide a reasonable rate of interest on the outstanding principal as determined under paragraph (1) above; and
- (3) reimburse the contractor for the cost of any other obligations required of him under the contract, including (but not limited to) payment of taxes, costs of carrying appropriate insurance, and costs of repair and maintenance if so required of the contractor.

(c) Funds appropriated to the Administrative Office of the United States Courts may be utilized by the Director to make payments becoming due from time to time from the United States as current charges in connection with agreements entered into under authority of this section.

(d) With respect to any interest in real property acquired under the provisions of this section, the same shall be subject to state and local taxes until title to the same shall pass to the Government of the United States.

(e) No purchase contract shall be entered into pursuant to the authority of this section until a prospectus has been submitted and approved in accordance with section 8 of this Act.

Section 11: Assignment Of Space

(a) The Director is authorized to assign space in all facilities acquired or maintained by the Director as deemed appropriate by the Director.

(b) The Director is authorized to provide excess space in facilities acquired or maintained by the Director to federal agencies, through the Administrator of the General Services Administration, and to obtain reimbursement for such space.

(c) The Director is authorized to negotiate with the Administrator of the General Services Administration a reasonable rate for space furnished to federal agencies. Such charges shall not exceed the actual costs incurred by the Director for the provision of such space or services.

(d) The Director is authorized to make space available in any facility maintained by the Director for the provision of services incidental to the functioning of the Courts of the United States, including the provision of such services to the public, and to obtain reimbursement for such space at rates to be determined by the Director.

(e) Any moneys obtained by the Director pursuant to this section may be maintained in the Judicial Space and Facilities Management Fund and may be applied to such purposes as set forth in section 9 of this Act.

Section 12: Reimbursement Of Administrator

The Director shall reimburse the Administrator of the General Services Administration for court accommodations provided or maintained by the General Services Administration at rates to be negotiated by the Director, but in no case shall such rates exceed the actual costs incurred by the General Services Administration for the provision of such space or services.

Section 13: Federal Regulatory Requirements

Whenever the Director shall acquire, construct, lease, alter, or maintain any court accommodations, whether by contract or otherwise, the Director shall comply with statutory and regulatory provisions which are applicable to all public buildings or which otherwise are applicable to all Federal agencies, including the judiciary.

Section 14: Effective Date of Act

(a) This Act shall be effective sixty (60) days after the Act is signed into law.

(b) Within 180 days after this Act becomes effective, the Director and the Administrator of the General Services Administration shall develop and submit to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives, for consideration and approval, a plan for the implementation of this Act, including, as agreed to by the Director and the Administrator, any transfer of funds

previously paid by the Director into the Federal Building Fund and any transfer of title or leasehold interest for court accommodations from the Administrator to the Director.

### ANALYSIS OF LEGISLATION

Section 1: Section 1 sets forth the short title of the Act.

Section 2: Section 2 sets forth definitions of the key terms used in the Act.

Section 3: Section 3 will amend Title 28 of the United States Code by providing the Director of the Administrative Office of the Courts with certain specific authority with respect to carrying out his responsibility to provide accommodations for the Courts.

The effect of this section will be to enable the AO to take action independently of GSA in order to ensure that the Courts' space needs are met in a timely manner. This section will primarily be important in those situations where GSA cannot provide the space required by the Courts without significant delays. As provided in section 6, where GSA can respond adequately and in a timely manner to the Courts' needs, the Director may request that GSA provide such space to the Courts

and, thus, the Director would not need to use the authority granted him in this section.

Section 4: Section 4 would amend Title 28 by providing the Director with authority to enter into contracts for the provision of architectural, engineering, or construction services in order to carry out the authority provided in Section 3. The section would provide the Director with the contractual authority to arrange for the construction or alteration of court accommodations should the Director determine not to request such space or services from GSA.

Section 5: Section 5 would provide the Director with the authority to enter into contracts with any person or firm for the operation and maintenance of any Court accommodations. This section would enable the Director to maintain court accommodations in the event that the Director obtains space independently of GSA.

Section 6: Section 6 would make clear that the Courts may continue to rely on GSA to provide the space and services required by the Courts. Thus, the Director would be authorized to request that the Administrator of the General Services Administration provide, acquire, or maintain the space and services required by the Courts and the Administrator, upon receiving such a request, would be authorized and directed to provide and maintain such accommodations. The Administrator would also be directed to give priority to providing the Courts



with contiguous space and to endeavor to provide such reasonable alterations as may be requested and financed by the Director. The Director would also be authorized to transfer title or leasehold interest to any space or facility acquired by the Director to the Administrator so that the Administrator may then provide the necessary space and services required by the Courts.

This section clearly indicates that the authority granted the Director in section 3 is discretionary and that the Courts may continue to obtain their space and service requirements through GSA. The section does not require GSA to comply with all specific requests made by the Director but, rather, to continue to provide sufficient space and services as required by the Courts when requested to do so by the Director.

This section would also enable the Courts to continue to rely on GSA to provide space for the Courts in mixed-use buildings. In such buildings, the Administrator would be required to give priority to placing the Courts in contiguous space. In maintaining court space, the Administrator shall endeavor to comply with reasonable alteration requests made by the Courts, to the extent that such requests are not inconsistent with GSA leasing responsibilities and regulatory constraints, e.g., historical buildings, etc.

Section 7: This section would preclude GSA from transferring, closing, or disposing of court accommodations without obtaining the prior consent of the Director. In those

situations where GSA desires to transfer or close a facility and the Director desires to continue to occupy such space, the section would enable the Administrator to transfer title or leasehold interest to the Director.

Section 8: Section 8 of the Act would set forth the procedure for obtaining Congressional approval for Court projects undertaken by the AO. Under this section, the Director would be required to obtain authorization from the Public Works Committees of the House and Senate for any project involving the acquisition or construction of space for court accommodations which exceeds \$1,500,000. The Director would also be required to obtain authorization for any alteration to leased space where the alterations would exceed \$750,000. Consistent with the intent of the recent amendments to the Public Buildings Act, the Director would be precluded from leasing space for permanent court accommodations if the average annual rental cost of such space would exceed \$1,500,000, unless the Director certified to the Public Works Committees that such space could not be accommodated in an existing public building or in a building to be acquired or constructed. Committee approval would be required before the Director could execute a lease where the average annual rental cost would exceed \$1,500,000.

The prospectus procedures set forth in this section are analogous to the statutory requirements set forth for GSA in the Public Buildings Act, as recently amended. The AO would be

required to submit a detailed prospectus to Congress in order to obtain authorization and funding for any major projects which the Courts seek to undertake independently of GSA. The prospectus would be submitted to the Public Works Committees in view of their expertise in the area of public buildings.

Subsection (a)(3) of this section would require the Director to justify any determination to acquire space independently rather than using other government owned or leased space in that locale. This subsection would establish the Public Works Committees as the appropriate forum for resolving any disagreements between the AO and GSA regarding the most appropriate space for specific court accommodations.

Section 9: This section would amend the provisions of Title 28 by establishing the Judicial Space and Facilities Management Fund in the Treasury of the United States in which would be placed all appropriations for the acquisition, alteration, construction, or maintenance of space and facilities or the lease of space or facilities for judicial accommodations. This section would provide permanent authorization to expend monies from this Fund in such amounts as determined by the Director. The Director would be authorized to use these funds: (1) to pay for the acquisition of space and facilities; (2) to pay for the lease of space or facilities for court accommodations; (3) to pay contractors hired to construct or alter facilities for court accommodations; (4) to pay contractors

for the maintenance of court accommodations; and (5) to pay all management and overhead costs associated with the acquisition, construction, lease, maintenance, or management of Court accommodations. The Director would also be authorized to use these funds to pay GSA for space and services where such space or services are provided by GSA. In addition, this section would allow the Director to maintain any unexpended appropriations in the Judicial Space and Facilities Management Fund to be expended on the provision or maintenance of space for court accommodations in succeeding fiscal years.

By establishing a Judicial Space and Facilities Management Fund analogous to such other governmental funds as the Federal Buildings Fund or the Postal Service Fund, this section would enable the Courts to control their appropriations and to set their own priorities with respect to the expenditure of funds for space and facilities management. The Courts would be required to use the funds to ~~pay for all~~ new projects as well as for maintenance and leasing of space, whether to GSA or to private contractors. The Courts would accordingly be required to become accountable for their own expenditures, as recommended in the NAPA Report. (NAPA Report at 23-24)

In order to provide appropriate Congressional overview over expenditures from this Fund, the Director would be required to provide the Appropriations Committees with a yearly, detailed

accounting of all expenditures and the amount of any unexpended funds, if any.

Section 10: This section would provide that the Director may enter into a purchase contract which shall provide that title to the property shall vest in the Director at the expiration of a specified lease term. No such contract shall be entered into by the Director until a prospectus has been submitted and approved in accordance with section 8 of this Act. Thus, this section would enable the Director to enter into lease/purchase arrangements with the prior approval of the Public Works Committees. Such authority would provide the Director with an additional means by which to satisfy the Courts' long-range space requirements.

Section 11: This section would provide that the Director shall be authorized to assign space in facilities acquired or maintained by the Director. The Director would have authority to lease excess space in such facilities to other federal agencies, through GSA. If the Director leases space to GSA, the Director would be authorized to negotiate a reasonable rental rate with the Administrator, but in no case would such rate exceed the cost of such space to the Courts. The Director would be authorized to retain any such proceeds in the Judicial Space and Facilities Management Fund. The Director would also be authorized to make space available for the provision of services incidental to the functioning of the Courts and to obtain



reimbursement for such space. This authority would enable the Director to make space available for such services as food and copying services.

The primary significance of this section is that the Courts would be provided the flexibility to plan for future space needs. The Director would be able to acquire space which exceeds the Court's current requirements but which will be necessary in the future. In the interim, the Director would be able to lease such space to other federal agencies. In order to preclude involving the Courts in real estate "banking," the Director's authority would be limited in terms of the rental rate which could be charged other federal agencies.

Section 12: This section would amend the Public Buildings Act of 1949, 40 U.S.C. § 490, by providing that GSA's charges for space and services provided for court accommodations shall be limited to reasonable rates to be negotiated with the Director, but that in no case may such charges exceed the actual costs incurred by GSA. The effect of this section would be to preclude GSA from charging the courts the prevailing commercial rate for space and services. This result is compelled by the fact that the Courts would be receiving independent appropriations for their space needs, and thus, it would be inappropriate for the Courts to contribute further to the Federal Buildings Fund.



Section 13: This section would confirm that certain statutory provisions which pertain to the operation of all federal buildings, such as access for the handicapped or contracting priority for the blind, would apply to buildings maintained by the AO as court accommodations. Similarly, other legislation which regulates all federal agencies, including the judiciary, such as the National Environmental Policy Act, would also apply. However, legislation which specifically applies only to executive agencies would not apply to court accommodations which are acquired or maintained by the AO.

Section 14: This section is intended to provide an effective date for the Act as well as to set forth provisions for a transitional period during which transfer of authority and funds should be negotiated. Under this section, the Director and the Administrator would seek to reach an accommodation regarding the possible transfer of funds previously paid by the AO into the Federal Buildings Fund to the Judicial Buildings Fund. Further agreement should be reached regarding the possible transfer of title or leasehold interests in specific accommodations to the Director, although this may not prove necessary at first. This plan would be submitted to the Public Works Committees for consideration, including possible revision, and approval.

# Budgetary Issues

## **BUDGETARY ISSUES**

### **Memoranda Submitted by**

**Judge William G. Young**

**On behalf of the Budget Committee of the Judicial Conference**

### **Summary**

Judge Young submitted two memoranda to the Federal Courts Study Committee on behalf of the Budget Committee of the Judicial Conference. The initial memorandum focuses more narrowly on issues concerning revenue raising and garnering resources for the judiciary. The supplementary memorandum emphasizes the broader issue of funding the federal courts.

The lack of adequate funding for the judiciary is demonstrated by the disparity between judicial responsibilities and the resources allocated by the Congress to discharge those responsibilities. The Budget Committee supports the following two proposals which are already under consideration by the Federal Courts Study Committee. The first proposal would require that judicial impact statements be mandated by statute so that the practical effect on the judiciary of pending legislation be formally and rigorously analyzed as part of the legislative process. The second proposal involves law review commissions which would be charged with analyzing the fiscal impact on the courts of certain legislation and recommending corrective action.

The issue of revenue raising and garnering resources for the judiciary raises the fundamental policy question - are the courts of the United States to be a "free good" for American society as a whole, at least generally, or should such scarce resources require user fees from those able to pay? This is such a basic concern that authoritative recommendations on this subject from the Federal Courts Study Committee would be of real significance in formulating the judiciary's budget submissions to the Congress.

Preliminary to any such recommendations, there are at least two areas of inquiry that should be addressed: (1) a study of the manner and extent to which court fees actually limit access and (2) a calculation of the actual per judge day cost of the operation of the United States Courts.

To the extent that the United States Courts are not to be a totally free good for our society, consideration ought be given to measures for raising revenue which go beyond the access charge or filing fee. Three measures appear to warrant study: (1) shifting all or part of the courts actual costs onto the party to whom the fee is shifted; (2) assessing government agencies the full costs of judicial services; and (3) including a provision in sanction orders to recompense the judicial system itself for the abuse which

warranted the sanction.

Other areas for analysis which implicate the funding of the United States courts include: (1) expenses mandated by the Constitution; (2) the practice of basing the Judiciary's budget request on current services estimates as mandated by the Office of Management and Budget. Current services estimates provide funding at the current level of services without taking projected workload increases into account; (3) relieving the Judiciary of the costs of security; (4) consolidating the Administrative Office appropriation as a separate activity within the salary and expenses portion of the budget; (5) developing regional offices of the Administrative Office; and (6) developing one standard administrative operating procedure within the clerk's division of the courts.

There are certain matters which are probably best left beyond the purview of the committee's endeavors. These would include: (1) the manner in which the Congressional committees are formed to consider the judiciary and related budgets; (2) the manner in which the Judicial Conference presents and advocates the judicial budget; (3) decentralized budgeting within the judiciary; and (4) personnel formulas for staffing the courts.

#### **Recommendations**

The Federal Courts Study Committee should take full advantage of their mandate and authorize studies pertaining to the funding of the federal courts. The committee has the opportunity to commission studies that might otherwise be considered too controversial. For example, a study of the actual per judge day cost of operating the courts.

#### **Comments**

The Budget Committee has proposed several areas of study that the Federal Courts Study Committee might wish to address. Because these issues are crucial to the future of the federal courts, it is suggested that the committee exercise their broad powers and commission some of the studies recommended in these memoranda.

We question three of the four topics which the Budget Committee feel are beyond the scope of the committee. The first issue involves the manner in which the Congressional committees are formed to consider the judiciary and related budgets. Since there are several members of Congress serving on the committee this might be the ideal forum in which to discuss this topic. The second issue involves the manner in which the Judicial Conference presents and advocates the judicial branch. This topic ties into the issue of creating a chancellor position for the federal judiciary and is currently being addressed by the committee. The third issue concerns decentralized budgeting within the judiciary. The committee is poised to address this issue in conjunction with a report submitted to the committee by Steve Flanders. This report

addresses the distribution of administrative responsibilities within the federal court system.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
BOSTON, 02109

WILLIAM G. YOUNG  
DISTRICT JUDGE

August 22, 1989

Hon. Levin H. Campbell, Chief Judge  
First Circuit Court of Appeals  
16th Floor - McCormack PO & CH  
Boston, MA 02109

Dear Judge Campbell:

Enclosed you will find the Supplementary Memorandum of the Budget Committee concerning the work of the Federal Courts Study Committee. Together with our original draft memorandum -- now typed and approved by the Budget Committee -- these memoranda constitute the recommendations and suggestions of the Budget Committee of the Judicial Conference concerning the work of your Committee. As I have stated earlier, we will be happy to follow up any of these points with a more substantive discussion should the Federal Courts Study Committee desire.

Please extend my thanks to Judge Weis and Bill Slate for keeping us informed of the work of the Federal Court Study Committee. I appreciate it.

Cordially,

*William G. Young (wa)*

William G. Young  
for the Budget Committee  
of the Judicial Conference

Enclosures

cc: Members of the Budget Committee

Hon. Robert Vance, Chairman  
Committee on Space and Facilities

/a

bc: Vincent Flanagan, Circuit Executive



MEMORANDUM

To: Hon. Levin H. Campbell  
Chief Judge, First Circuit  
for the Federal Courts Study Committee

From: William G. Young, District Judge  
for the Budget Committee of the Judicial Conference <sup>1/</sup>

Re: Budget Committee Recommendations  
to the Federal Courts Study Committee

Date: July 31, 1989

- A. Perhaps the most significant area for analysis implicates a fundamental policy choice -- are the courts of the United States to be a "free good" for American society as a whole, at least generally, or should such scarce resources require user fees from those able to pay? <sup>2/</sup> While this is a matter that has received sporadic attention from both Congress and various committees of the Judicial Conference, it is such a basic concern that authoritative recommendations on this subject from the Federal Courts Study Committee would be of real significance in formulating the Judiciary's budget submissions to the Congress.

Preliminary to any such recommendations, there are at least two areas of inquiry that ought be addressed:

1. A study of the manner and extent to which court fees actually limit access. It is essential to learn just what fees affect what kinds of litigants in what type of cases.
2. A calculation of the actual per judge day cost of the United States Courts. Some estimates place the fully amortized cost of all aspects of the operations of a United States district judge at \$15,000

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<sup>1/</sup> This draft memorandum is drawn from numerous discussions with judicial officers, Administrative Office staff personnel, and others concerned with the funding of the United States Courts. At present, however, it has not been discussed with the members of the Budget Committee, and represents nothing more than the listing of ideas that appear to warrant further analysis.

<sup>2/</sup> There are, of course, constitutional limits on the charging of user fees since the government has the ultimate monopoly on dispute resolution procedures concerning vital legal relationships. See Boddie v. Connecticut.

per court day. There is, however, no standard methodology and no general agreement concerning how to allocate the costs of the Supreme Court and Circuit Courts (whose precedents directly control and guide an indeterminate number of cases which never appear on their dockets). Likewise, there are no reliable estimates of the per court day expense of the operations of the Bankruptcy Courts and the Magistrate's Sessions. Such calculations are vital to any system that contemplates even a partial reimbursement of the taxpayer cost of judicial services.

To the extent that the United States Courts are not to be a totally free good for our society, consideration ought be given to measures for raising revenue which go beyond the access charge or filing fee. Three measures appear to warrant study:

3. Much like fee shifting statutes presently on the books, consideration ought be given to shifting all or part of the court's actual costs onto the party to whom the fee is shifted.
4. Judge Stephen Breyer has a provocative idea for assessing government agencies the full costs of judicial services. As such agencies are our major litigants, he reasons that if they bore the actual costs of litigation (not merely their own attorneys' fees) they would both husband their resources and more carefully prioritize their litigation and Congress, through the appropriations process, could better monitor the manner and extent to which judicial resources are devoted to the various executive agencies.
5. Sanctions -- Today judicial sanctions do little more than recompense an injured party for a litigant's abuse of the judicial system. The transaction costs to the system itself, however, are substantial. Perhaps every sanction order ought include a provision to recompense the judicial system itself for the abuse which warranted the sanction.

**B. Other areas for analysis which implicate the funding of the United States Courts:**

1. Expenses mandated by the Constitution. Certain expenditures within the judiciary budget are of constitutional magnitude -- the costs of jurors in cases where jury trials are mandated by the Sixth

and Seventh Amendments, the salaries of judicial officers under Article III, and the costs of indigent criminal defenders under the Sixth Amendment come immediately to mind -- yet these costs are subjected to the same appropriations process as the remainder of the judiciary budget. Consideration ought be given to exempting such expenditures from the Anti-Deficiency Act or providing for them through an indeterminate appropriation. It will be remembered that in 1986 we actually ran out of funds to pay civil jurors notwithstanding the litigants' constitutional right to jury trials.

2. Budgetary process. Some study ought be given to the manner in which the definitions used in the current services estimates are derived and how the judiciary may be of more assistance to the Congress in accurately crafting those definitions.
3. Security. Keeping the peace is a quintessential Executive function. Consideration ought be given to relieving the Judiciary of such costs within its budget.
4. Buildings. Consider legislation allowing the Judiciary full use of its contribution to the GSA building fund, a measure which would result in, at a minimum, a clearer allocation of the actual costs of judicial services.
5. Administrative Office.
  - a. Consider consolidation of the Administrative Office appropriation as a separate activity within the salary and expenses portion of the Judiciary budget, a step which would simplify the reprogramming of funds to best meet the judiciary's needs.
  - b. Consider regional offices of the Administrative Office, the better to serve the nationwide court system.
6. Budgetary aspects of non-judicial functions. Consider developing more standard administrative operating procedures within the Clerk's division of the courts. Apparently the Fifth Circuit is a model for this type of activity.
7. Budgetary aspects of judicial operations. Any suggestion along these lines is bound to be ex-

tremely controversial in view of the appropriate concern for judicial independence in dealing with the myriad of different cases that come before our courts and the various legal mores throughout the country. Still, if as recommended above, the Federal Courts Study Committee were to embark on -- or even call for -- a study of the per judge day cost of our courts, such inquiry would inevitably reveal disparities in the cost of handling what -- on the surface at least -- appear to be similar cases. The Federal Courts Study Committee may appropriately ask 'Why?'

C. Respectfully, there are certain matters which are probably best left beyond the purview of the Committee's endeavors. These would include:

1. The manner in which the Congressional committees are formed to consider the judiciary and related budgets. This is a matter uniquely within the responsibility of the Legislative branch of government.
2. The manner in which the Judicial Conference presents and advocates the judicial budget. This is a matter fully considered in the study and overhaul of the Judicial Conference itself. It is probably best to let that system function and address internal organizational issues for a few more years before venturing a general reassessment.
3. Decentralized budgeting within the judiciary. This matter is the subject of a careful study already well advanced with monitoring and auditing systems already established.
4. Personnel formulas for staffing the courts. Here, too, a full scale reassessment is already in the works and its related time study already under way.

SUPPLEMENTARY MEMORANDUM

To: Hon. Levin H. Campbell,  
Chief Judge, First Circuit  
for the Federal Courts Study Committee

From: William G. Young, District Judge  
for the Budget Committee of the Judicial Conference

Re: Budget Committee Recommendations  
to the Federal Courts Study Committee

Date: August 22, 1989

At its meeting on July 30 - August 1, 1989, the Budget Committee of the Judicial Conference unanimously endorsed -- with one major addition and one modification -- the draft memorandum of areas for further study earlier submitted to you for the use of the Federal Courts Study Committee. This supplementary memorandum discusses the addition and modification.

- A. The major addition -- the disparity between resources available and responsibilities imposed. The Budget Committee unanimously joins in calling the attention of the Federal Courts Study Committee to the thorough and compelling letter of the Hon. Judith N. Keep, District Judge for the Southern District of California, concerning the effect of the increased criminal jurisdiction on the Court's overall workload. The members of the Budget Committee could each recite similar situations in their several courts throughout the country. Moreover, equally severe disparities exist in the Bankruptcy Court system. We would be remiss if we did not emphasize to the Federal Courts Study Committee that the ever widening gap between judicial responsibilities and the resources to discharge them is -- and ought be -- a matter of central concern. <sup>1/</sup>

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<sup>1/</sup> The draft memorandum focused more narrowly on issues concerning revenue raising and garnering resources for the judicial branch. Significant as these issues are, the full Budget Committee (spurred by Judge Keep's important letter) believes recognition of the responsibilities - resources gap to be most critical.



Recognizing the central issue, however, is but a starting point for addressing it. As pointed out in the initial memorandum, the Administrative Office and the Judicial Conference and its several committees are presently working actively to provide the necessary resources on a continuing basis. Two of the longer range structural measures which warrant analysis are:

1. Judicial Impact Statements. A fair amount of literature exists discussing the concept of requiring by statute that the practical effect on the judiciary of pending legislation be formally and rigorously analyzed as part of the legislative process. The benefits of such a requirement are said to lie in the recognition by Congress and the public of the actual costs of new legislation and its effects on access to the courts. The primary risks are seen in burdening the legislative process.
2. Law Review Commissions. While the primary focus of such proposed commissions has been the synthesizing of conflicting legislative enactments and correcting glitches discovered in major legislation, there is no reason why such a commission might not be charged with analyzing the fiscal impact on the courts of certain legislation and recommending corrective action. Such reports might be given a special status legislatively to ensure their consideration by the Congress. For example, now that the courts are working with the sentencing guidelines, we know a great deal more than we did before their enactment about their day-to-day fiscal impact. Would it not be helpful to institutionalize a procedure for analyzing this impact and detailing the resources required to address it -- both to the Judicial Conference and to the Congress?

Neither of these suggestions is original and both are already receiving the attention of the Federal Courts Study Committee. See Chairman's Report, Federal Courts Study Committee, July 31, 1989, Sections E.2., f. and g. Still, the Budget Committee hopes that its recommendation that these proposals be followed up will be helpful.

- B. The minor modification is easily stated. In our draft memorandum at item B. 4., we made a certain suggestion with respect to the judiciary's contribution to the GSA building fund. In view of the comprehensive, carefully crafted submission of the Committee on Space and



Facilities, we withdraw our suggestion and enthusiastically endorse the recommendations of the Committee on Space and Facilities.

cc: Members of the Budget Committee

Hon. Robert Vance, Chairman  
Committee on Space and Facilities

## ADDITIONAL MISCELLANEOUS DOCUMENTS

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By the General Counsel's Office of the Administrative Office of the United States Courts
- III. "Letter from U.S. Assistant Attorney General Edward S.G. Dennis, Jr. to Joseph F. Weis, Jr." (Federal Criminal Jurisdiction)
- IV. "Statistical Reports on Iowa's Grievance Resolution Service"  
By Gordon E. Allen, Deputy Attorney General, State of Iowa
- V. "Tax Conflict Resolution: Proposed---A Modest Court of Tax Appeals"  
By Harold C. Wilkenfeld
- VI. Inter-Circuit Conflict
  - A. "A Proposal for a Unified Court of Appeals"  
By Judge Joseph F. Weis, Jr.
  - B. "Non-Structural Solutions to the Problem of Intercircuit Conflicts"  
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  - E. "Conflict Resolution"  
By President Rex E. Lee, Brigham Young University
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- VII. "Report of the Special Committee, Federal Court Section,  
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  - A. Criminal Justice
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FEDERAL COURTS STUDY COMMITTEE  
July 31, 1989

LEGISLATION ENACTED IN LAST TWO DECADES  
TENDING TO INCREASE THE WORKLOAD OF THE FEDERAL COURTS

1. Freedom of Information Act Amendments and Privacy Act of 1974, 5 USCS 552
2. Truth in Lending Act
3. Legal Services Corporation Act of 1974, P.L. 93-355
- EXC 4. Occupational Safety and Health Act of 1970, P.L. 91-596
5. Speedy Trial Act, P.L. 96-43
6. National Works Compensation Act
7. Federal Election Campaign
8. Land Sales Full Disclosure Act
9. Consumer Goods Pricing Act, P.L. 94-145
10. Energy Policy and Conservation Act
11. Omnibus Crime Control and Safe Streets Act Amendments
- EXC 12. Equal Employment Opportunity Act of 1972, P.L. 92-261
13. Tax Reform Act of 1976 (Administrative Summons Enforcement)
14. Social Services Amendments of 1974 (Child Support Enforcement), 88 Stat. 2337
- EXC 15. Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513
16. Employee Retirement Income Security Act of 1974, P.L. 93-406
17. Organized Crime Control Act of 1970 (Includes Civil and Criminal RICO), P.L. 91-452
- CON 18. Juvenile Justice and Delinquency Prevention Act of 1974, P.L. 93-415
- EXC 19. Federal Coal Mine Health and Safety Act of 1989, P.L. 91-173
20. National Environmental Policy Act of 1989, P.L. 91-190
21. Fair Credit Reporting Act
- CON 22. Consumer Credit Protection Act Amendments of 1970, P.L. 91-508
- EXC 23. Clean Air Act Amendments of 1970, P.L. 91-604
24. Water Pollution Control Act Amendments, P.L. 94-273
- EXC 25. Toxic Substances Control Act, P.L. 94-469
- EXC 26. Consumer Product Safety Act, P.L. 94-573
- CON 27. Consumer Leasing Act of 1976, P.L. 94-240
- CON 28. Equal Credit Opportunity Act Amendments of 1976, P.L. 94-239

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EXC: exclusive federal jurisdiction  
CON: concurrent jurisdiction  
Blank in margin: ambiguous

- 29. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576
- 30. Renegotiation Amendments of 1968, P.L. 90-634
- 31. Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Parens patriae actions), P.L. 94-435
- EXC 32. Antitrust Procedures and Penalties Act, P.L. 93-528
- 33. Older Americans Amendment of 1975 (Age Discrimination Act of 1975, P.L. 94-135
- 34. Securities ct Amendments of 1975, P.L. 94-29
- EXC 35. Voting Rights Act Amendments of 1970 (and 1982 amendments), P.L. 91-285, 97-205
- EXC 36. Fishery Conservation and Management Act of 1976, P.L. 94-265
- EXC 37. Resource Conservation and Recovery Act of 1976, P.L. 94-580.
- 38. Civil Rights Attorney's Fee Awards Act of 1976, P.L. 94-559
- CON 39. Fair Labor Standards Amendments of 1974, P.L. 93-259
- EXC 40. Headstart, Economic Opportunity, and Community Partnership Act of 1974, 85 Stat. 55; 88 Stat. 2291
- 41. Act of October 19, 1976, for a General Revision of the Copyright Law, 90 Stat. 2541
- CON 42. Act of October 21, 1976, for Judicial Review of Administrative Agency Action
- 43. Clean Air Amendments of 1977, P.L. 95-95; 95-190
- 44. Department of Energy Organization Act, 91 Stat. 565
- 45. Food and Agriculture Act of 1977, 91 Stat. 913
- 46. Federal Mine Safety and Health Amendments Act of 1977, 91 Stat. 1290
- 47. Foreign Corrupt Practices Act of 1977, 91 Stat. 1494
- 48. Age Discrimination in Employment Act Amendments of 1978 and 1986, 92 Stat. 189; 100 Stat. 3342
- 49. Communications Act Amendments of 1978, 92 Stat. 33
- 50. Right to Financial Privacy Act of 1978, 92 Stat. 3697
- EXC 51. Act of November 6, 1978, to Establish a Uniform Law on the Subject of Bankruptcy, 92 Stat. 2549
- EXC 52. Contract Disputes Act of 1978, 92 Stat. 2383
- 53. Customs Procedural Reform and Simplification Act of 1978, 92 Stat. 888
- EXC 54. Education Amendments of 1978 and 1984, 92 Stat. 2143; 99 Stat. 379
- 55. Financial Institutions Regulatory and Interest Rate Control Act of 1978, 92 Stat. 3641
- EXC 56. Natural Gas Policy Act of 1978, 92 Stat. 3350
- 57. Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 634
- EXC 58. Powerplant and Industrial Fuel Use Act of 1978, 92 Stat. 3289
- 59. Act of October 13, 1978, to Revise the Interstate Commerce Act, 92 Stat. 29
- 60. Trade Agreements Act of 1979, 93 Stat. 144 (19 U.S.C. §1501)

- EXC 61. Depository Institutions Deregulation and Monetary Control Act of 1980, 94 Stat. 132 (12 U.S.C. §1818(h))
- EXC 62. Civil Rights Institutionalized Persons Act, 94 Stat. 349
- 63. Deep Seabed Hard Mineral Resources Act, 94 Stat. 553 (5 U.S.C. §701)
- CON 64. Ocean Thermal Energy Conversion Act of 1980, 94 Stat. 974
- EXC 65. Multi-Employer Pension Plan Amendments Act of 1980, 94 Stat. 1208
- CON 66. Housing and Community Development Act of 1980, 94 Stat. 1614
- EXC 67. Federal Railroad Safety Authorization Act of 1980, 94 Stat. 1811
- EXC 68. Automobile Fuel Efficiency Act of 1980, 94 Stat. 1821
- 69. Social Security Disability Amendments of 1980, 94 Stat. 441
- 70. Veterans Rehabilitation and Education Amendments of 1980, 94 Stat. 2171
- 71. Securities Investor Protection Act-Financial Privacy Act Amendments, 92 Stat. 249
- EXC 72. Privacy Protection Act of 1980, 94 Stat. 1879
- 73. Classified Information Procedures Act, 94 Stat. 2025
- EXC 74. Energy Security Act, 94 Stat. 611
- CON 75. Equal Access to Justice Act, 94 Stat. 2325
- EXC 76. Solid Waste Disposal Act Amendments of 1980, 94 Stat. 2055
- 77. Federal Question Jurisdictional Amendments Act of 1980, 94 Stat. 2369
- EXC 78. Comprehensive Environmental Response, Compensation and Liability Act of 1980
- EXC 79. Act of December 12, 1980, to Amend the Patent and Trademark Laws, 94 Stat. 3015 (35 U.S.C. § 141-45)
- 80. Parental Kidnapping Prevention Act of 1980
- 81. Act of September 15, 1980, Facilitating Enforcement by the Coast Guard of Drug Importation Laws
- 82. Veterans Rehabilitation and Education Amendments of 1980, 94 Stat. 2171
- EXC 83. Lacey Act Amendments of 1981, P.L. 97-79
- EXC 84. Intelligence Authorization Act for Fiscal Year 1982, P.L. 97-89
- EXC 85. Agriculture and Food Act of 1981, P.L. 97-98
- 86. International Security and Development Cooperation Act of 1981, P.L. 97-113
- 87. Immigration and Nationality Act Amendment of 1981, P.L. 97-116
- 88. Omnibus Reconciliation Act of 1981, P.L. 97-123
- 89. Export Administration Act of 1981, P.L. 97-145
- 90. Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-248
- 91. Omnibus Budget Reconciliation Act of 1982, P.L. 97-253
- 92. Communications Amendments Act of 1982, P.L. 97-259



- EXC 93. Victim and Witness Protection Act of 1982, P.L. 97-291
- 94. Reclamation Reform Act of 1982, P.L. 97-293
- EXC 95. Job Training Partnership Act, P.L. 97-300, and  
Amendments of 1986, P.L. 99-496
- 96. Garn-St.Germain Depository Institutions Act of 1982,  
P.L. 97-320
- 97. False Identification Crime Control Act of 1982, P.L.  
97-398
- 98. Nuclear Regulatory Commission Authorization Act, P.L.  
97-415, 28 U.S.C. §158
- EXC 99. Nuclear Waste Policy Act of 1982, P.L. 97-425
- 100. Futures Trading Act of 1982, P.L. 97-444, and 1986,  
P.L. 99-641
- EXC 101. Federal Oil and Gas Royalty Management Act of 1982,  
P.L. 97-451
- 102. Rail Safety and Service Improvement Act of 1982, P.L.  
97-468
- EXC 103. Migrant and Seasonal Agricultural Worker Protection  
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- 104. Internal Revenue Code Amendments, P.L. 97-473
- 105. Payment-in-Kind Tax Treatment Act of 1983, P.L. 98-4
- 106. Social Security Amendments of 1983, P.L. 98-21
- 107. Interest and Dividend Tax Compliance Act of 1983, P.L.  
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- EXC 108. Dairy and Tobacco Adjustment Act of 1983, P.L. 98-180
- CON 109. Domestic Housing and International Recovery and  
Financial Stability Act, P.L. 98-181 (Titles I - XI of  
the Supplemental Appropriations Act of 1984
- 110. United States Commission on Civil Rights Act of 1983,  
P.L. 98-183
- EXC 111. Education of the Handicapped Act Amendments of 1983,  
P.L. 98-199
- 112. Rehabilitation Amendments of 1984, P.L. 98-221 and  
Amendments of 1986, P.L. 99-506 (20 U.S.C. §3873)
- 113. Shipping Act of 1984, P.L. 98-237
- 114. Agricultural Programs Adjustment Act of 1984, P.L. 98-  
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- 115. Controlled Substance Registrant Protection Act of 1984,  
P.L. 98-305
- 116. Insider Trading Sanctions Act of 1984, P.L. 98-376
- 117. Education for Economic Security Act, P.L. 98-377
- 118. Retirement Equity Act of 1984, P.L. 98-397
- 119. Comprehensive Crime Control Act of 1984, P.L. 98-473
- 120. Aviation Drug-Trafficking Control Act, P.L. 98-499
- EXC 121. Carl D. Perkins Vocational Education Act, P.L. 98-524
- 122. Developmental Disabilities Act of 1984, P.L. 98-527
- 123. Trade and Tariff Act of 1984, P.L. 98-573
- 124. Small Business and Federal Procurement, Competition  
Enhancement Act of 1984, P.L. 98-577
- 125. Criminal Fine Enforcement Act of 1984, P.L. 98-596
- EXC 126. Hazardous and Solid Waste Amend. of 1984, P.L. 98-616
- 127. Export Administration Amend. Act of 1985, P.L. 99-64

- 128. International Security and Development Cooperation Act of 1985, P.L. 99-83
- 129. Internal Revenue Code Amendments (Imputed Interest Rules), P.L. 99-121
- 130. Food Security Act of 1985, P.L. 99-198
- EXC 131. Farm Credit Amendments Act of 1985, P.L. 99-205
- 132. Food Security Improvements Act of 1986, P.L. 99-260
- 133. Firearms Owners' Protection Act, P.L. 99-308
- EXC 134. Safe Drinking Water Act Amendments of 1986, P.L. 99-339
- 135. Education of the Handicapped Act Amendments of 1986, P.L. 99-457
- 136. Computer Fraud and Abuse Act of 1986, P.L. 99-474
- 137. Electric Consumer Protection Act of 1986, P.L. 99-495
- 138. Higher Education Amendments of 1986, P.L. 99-498, and 1987, P.L. 100-50
- EXC 139. Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499
- EXC 140. Electronic Communications Privacy Act of 1986, P.L. 99-508
- 141. Tax Reform Act of 1986, P.L. 99-514
- CON 142. Asbestos Hazard Emergency Response Act of 1986, P.L. 99-519
- 143. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, P.L. 99-554
- EXC 144. National Childhood Vaccine Injury Act of 1986, P.L. 99-660
- 145. Risk Retention Amendments of 1986, P.L. 99-563
- 146. Anti-Drug Abuse Act of 1986, P.L. 99-570
- 147. Government Securities Act of 1986, P.L. 99-571
- 148. Immigration Marriage Fraud Amend. of 1986, P.L. 99-639
- 149. Employment Opportunities for Disabled Americans Act, P.L. 99-643
- EXC 150. Health Program Act of 1986, P.L. 99-660
- 151. Water Resources Development Act of 1986, P.L. 99-662
- 152. Water Quality Act of 1987, P.L. 100-4
- 153. Surface Transportation and Uniform Relocation Assistance Act of 1987, P.L. 100-17
- 154. Farm Disaster Assistance Act of 1987, P.L. 100-45
- 155. Stewart B. McKinney Homeless Assistance Act, P.L. 100-77, and Amendments of 1988, P.L. 100-628
- 156. Competitive Equality Banking Act of 1987, P.L. 100-86
- 157. Medicare and Medicaid Patient and Program Protection Act of 1987, P.L. 100-93
- 158. Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1987, P.L. 100-146
- 159. Older Americans Act Amendments of 1987, P.L. 100-175
- 160. Public Health Service Amendments of 1987, P.L. 100-177
- 161. Sentencing Act of 1987, P.L. 100-182
- 162. Criminal Fine Improvements Act of 1987, P.L. 100-185
- 163. United States - Japan Fishery Agreement Approval Act of 1987, P.L. 100-220

- 164. Airport and Airway Safety and Capacity Expansion Act of 1987, P.L. 100-223
- CON 165. Agricultural Credit Act of 1987, P.L. 100-233
- 166. Housing and Community Development Act of 1987, P.L. 100-242
- 167. Civil Rights Restoration Act of 1987, P.L. 100-259
- 168. Age Discrimination Claims Assistance Act of 1988, P.L. 100-283
- EXC 169. Augustus F. Hawkins - Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, P.L. 100-297
- CON 170. Internat'l Child Abduction Remedies Act, P.L. 100-300
- 171. Retiree Benefits Bankruptcy Protection Act of 1988, P.L. 100-334
- 172. Rail Safety Improvement Act of 1988, P.L. 100-342
- 173. Medicare Catastrophic Coverage Act of 1988, P.L. 100-360
- 174. Worker Adjustment and Retraining Notification Act, P.L. 100-379
- 175. Disaster Assistance Act of 1988, P.L. 100-387
- 176. Agricultural Credit Technical Correction Act of 1988, P.L. 100-399
- 177. Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418
- 178. Fair Housing Amendments Act of 1988, P.L. 100-430 (28 U.S.C. §158)
- 179. Hunger Prevention Act of 1988, P.L. 100-435
- 180. Family Support Act of 1988, P.L. 100-485
- 181. Immigration Technical Corrections Act of 1988, P.L. 100-525
- 182. Small Business Administration Reauthorization and Amendment Act of 1988, P.L. 100-590
- 183. Health Omnibus Programs Extension of 1988, P.L. 100-607
- 184. Handicapped Programs Technical Amendments Act of 1988, P.L. 100-630
- 185. Technical and Misc. Revenue Act of 1988, P.L. 100-647
- 186. Trademark Law Revision act of 1988, P.L. 100-667
- 187. Water Resources Development Act of 1988, P.L. 100-676
- 188. Ocean Dumping Ban Act of 1988, P.L. 100-688
- 189. Anti-Drug Abuse Act of 1988, P.L. 100-690
- 190. Federal Employees Liability Reform and Tort Compensation Act of 1988, P.L. 100-694
- EXC 191. Major Fraud Act of 1988, P.L. 100-700
- 192. Insider Trading and Securities Fraud Enforcement Act of 1988, P.L. 100-704
- EXC 193. Natural Gas Pipeline Safety Act Amendments of 1976, 90 Stat. 2073
- 194. Federal Land Policy and Management Act of 1976, 90 Stat. 2744
- 195. P.L. 99-80, Amendments to Section 504 of Title 5 with Respect to Expense and Fee Awards

L. RALPH MECHAM  
DIRECTOR

JAMES E. MACKLIN, JR.  
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

WASHINGTON, D.C. 20544

May 16, 1989

Mr. William K. Slate, II  
Director, Federal Courts Study Committee  
22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, Pennsylvania 19106-1722

Dear Bill:

I write in response to your letter of April 18, 1989, in which you requested a listing of the non-judicial duties of Federal judges imposed by statute. I requested that the General Counsel's Office prepare such a listing, and I am pleased to enclose this list for your review.

You may find this listing surprisingly long, but in the interests of completeness, we decided to include not only administrative duties imposed on judges individually, but also those imposed on them collectively as members of courts and/or judicial councils. While it is often difficult to completely separate judicial duties from non-judicial duties, e.g., particularly with several of the statutes dealing with jurors, we have attempted to include everything that might reasonably be considered a non-adjudicative duty imposed on judges.

I trust you will find this information helpful in your efforts. Please do not hesitate to contact me if you desire further information.

Sincerely,



L. Ralph Mecham  
Director

cc: Honorable Joseph F. Weis, Jr.  
Honorable John C. Godbold  
Mr. James E. Macklin, Jr.  
Mr. Robert E. Feidler

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FIFTY YEARS OF SERVICE

TO THE FEDERAL JUDICIARY

1939 - 1989

## **STATUTORY NON-JUDICIAL DUTIES OF JUDGES AND COURTS OF THE UNITED STATES\***

(\*Note -- For purposes of this listing, the term non-judicial shall refer to non-adjudicative. Duties applicable to the Judicial Conference, the Chief Justice and Associate Justices of the Supreme Court, and to judges of the Claims Court and other non-Article III courts are not included.)

### **Title 18**

Section 1966 - Chief district judge to designate district judge to expedite civil RICO action certified as involving general public importance.

Section 3006A - District court, with approval of judicial council, to place into operation a plan for furnishing representation to persons financially unable to obtain such representation. Numerous duties are assigned to the court of appeals and the district court under this section, e.g., appointment of Federal Public Defender.

Section 3152 - District court and judicial council may recommend establishment of pretrial services in a particular district. If established, a panel consisting of the chief circuit and district judges and a magistrate, or their designees shall select a chief pretrial services officer.

Section 3153 - Chief pretrial services officer to select staff personnel, and obtain temporary and intermittent services, subject to approval of the district court.

Section 3155 - Chief judge of district court to receive annual report from chief pretrial services officer concerning administration and operation of pretrial services.

Section 3165 - Each district court to conduct continuing study of the administration of criminal justice in the court and submit a plan for the disposition of criminal cases to a reviewing panel of the judicial council. Plan may be modified with approval of the reviewing panel.

Section 3166 - Establishes specific guidelines that the district courts must incorporate when preparing their criminal justice plan under 18 U.S.C. § 3165.

Section 3174 - Permits chief district judge to declare judicial emergency and temporarily suspend time limitations of the Speedy Trial Act. Judicial council is required to approve such suspension.

Section 3602 - District court to appoint compensated and uncompensated probation officers, and designate chief probation officer.

### **Title 28**

Section 45 - Designates active judge, senior in commission, as chief judge of circuit.



**Title 28 cont'd.**

**Section 136** - Designates active judge, senior in commission, as chief judge of district.

**Section 137** - District judges to divide the business of the court as provided by rules and orders of the court. Chief district judge to enforce such orders and assign cases not covered by the rules. If majority of district judges are unable to agree upon adoption of rules and orders, judicial council shall issue necessary orders.

**Section 139** - District court to adopt rules governing the times for commencing regular sessions of the court.

**Section 152** - Court of appeals to appoint bankruptcy judges. If circuit judges are unable to agree, chief circuit judge shall appoint. Judicial council authorized to remove bankruptcy judges after providing notice and an opportunity to be heard.

**Section 154** - District court in district having more than one bankruptcy judge to designate a chief bankruptcy judge. Chief district judge to designate if majority of district judges cannot agree.

**Section 155** - Judicial council to approve temporary transfer of bankruptcy judges and to recall retired bankruptcy judges to active service.

**Section 156** - Judicial council to certify need for bankruptcy clerk and set conditions and limitations on the bankruptcy court's use of facilities and services.

**Section 157** - District court to make provision for referral of title 11 proceedings to the bankruptcy judges.

**Section 158** - Judicial council may establish bankruptcy appellate panels. District judges must agree, by majority vote, to authorize referral of appeals within their district to the panel.

**Section 253** - Chief judge of Court of International Trade, with approval of court, to supervise the fiscal affairs and clerical force for the court. Under rules of the court, chief judge to assign and reassign judges to hear cases.

**Section 291** - Chief circuit judge may temporarily designate and assign circuit judge to hold district court.

**Section 292** - Chief circuit judge may designate and assign district judge to sit with the court of appeals or to hold district court in another district within the circuit. Chief judge of the United States Court of Appeals for the District of Columbia Circuit may, under specified conditions, designate and assign any district judge of the circuit to serve on the Superior Court of the District of Columbia.

**Section 294** - Chief circuit judge or judicial council to designate and assign retired circuit or district judges to perform judicial duties within the circuit. Chief judge to designate and assign a retired judge of his court to perform judicial duties in his court. Chief judge to present certificate of necessity for assignment of retired judge from outside his circuit.



**Title 28 cont'd.**

**Section 295** - Chief judge or judicial council must approve all designations and assignments of active judges to another circuit.

**Section 331** - Chief circuit judges, chief judge of the Court of International Trade, and a district judge from each circuit shall serve on the Judicial Conference of the United States. The circuit and district judges, during their annual circuit judicial conference, shall designate a district judge to serve on the Judicial Conference.

**Section 332** - Chief circuit judges at least twice a year to convene a judicial council of the circuit. The membership of the council is determined according to a statutory scheme by a majority vote of active circuit judges. The council shall make necessary and appropriate orders for the administration of justice within the circuit, and is authorized to hold hearings, take sworn testimony, and issue subpoenas with respect to judicial conduct and disability complaints. All judicial officers and employees are to promptly carry into effect all orders of the judicial council.

Judicial councils to periodically review local rules promulgated by district courts.

Judicial councils may appoint the circuit executive, who shall serve under the supervision of the chief judge of the circuit. Council to approve employees hired by the circuit executive.

**Section 333** - Chief circuit judge to annually convene judicial conference of the circuit. All active judges within the circuit are required to attend the conference unless excused by the chief judge. Court of appeals shall provide rules for representation and participation of the bar at such conferences.

**Section 334** - Chief circuit judges may request the Judicial Conference to convene institutes and joint councils on sentencing and may invite district judges within their circuit to attend.

**Section 335** - Chief judge of the Court of International Trade to convene an annual judicial conference. The court shall provide rules for representation and participation of members of the court's bar.

**Section 372** - Majority of members of a judicial council to certify to the President a certificate of disability of a judge who is eligible to retire on disability but who does not do so.

Chief circuit judge to review judicial conduct and disability complaints and take appropriate action. Authorized to convene a special investigation committee, composed of circuit and district judges, if necessary for resolution of complaint. Circuit judicial councils to review reports of investigative committees and take such action as is appropriate, including possible referral to the Judicial Conference. Judicial councils may prescribe rules governing petitions and proceedings commenced under this section.

**Section 375** - Judicial Council to certify recall of bankruptcy judges and magistrates to active service.

**Title 28 cont'd.**

**Section 546** - District court to appoint an interim United States Attorney after the Attorney General's interim appointment expires.

**Section 565** - District court may appoint interim United States Marshal if office is vacant.

**Section 605** - Court of International Trade and United States Court of Appeals for the Federal Circuit to approve their respective budgets.

**Section 631** - Judges of the district courts to appoint United States Magistrates. If majority cannot agree, appointment is to be made by chief district judge. Removal of magistrates from office by a majority vote of the district judges, or, in the event of a tie, by a majority vote of the judicial council.

**Section 635** - Judicial councils to make recommendations to the Judicial Conference on the necessary expenses of magistrates.

**Section 711** - Court of appeals to appoint clerks and to approve appointment of clerk's deputies, clerical assistants, and employees. Court shall remove clerks and approve removal of clerk's personnel.

**Section 712** - Circuit judges to appoint their law clerks and secretaries.

**Section 713** - Court of appeals to appoint and remove librarians and to approve appointment and removal of library assistants.

**Section 714** - Court of appeals to appoint and remove criers and approve crier's appointment and removal of messengers.

**Section 715** - Chief circuit judge, with court approval, to appoint and remove senior staff attorney. Chief judge to approve appointment and removal of staff attorneys and secretarial and clerical employees. Chief judge of Court of Appeals for Federal Circuit, with court approval, to appoint and remove senior technical assistant. Court to approve appointment and removal of technical assistants.

**Section 751** - District court to appoint and remove clerk of court and to approve clerk's appointment and removal of deputies, clerical assistants, and employees.

**Section 752** - District judges to appoint their law clerks and secretaries.

**Section 753** - District court to appoint court reporters. Chief judge of district may recommend need for additional reporters to judicial council of the circuit.

**Section 755** - District judges may appoint criers and approve United States Marshal's appointment of bailiffs.

**Section 756** - Chief district judge to appoint an officer of the court if majority of district judges cannot agree on appointment.

**Section 871** - Court of International Trade to appoint and remove a clerk, chief deputy clerk, and other necessary personnel.

## **Title 28 cont'd.**

**Section 872** - Court of International Trade may appoint and remove criers.

**Sections 1861 - 1877** - District courts to devise and place into operation a plan for the random selection of grand and petit jurors. Such plan to be approved by a reviewing panel composed of the judicial council and the chief judge of the district or a district judge appointed to represent the chief judge.

**Section 2071** - Courts established by Act of Congress may prescribe rules for the conduct of their business.

**Section 2077** - Each court of appeals shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of the court.

**Title III of the Ethics in Government Act, 28 U.S.C. App. § 301** - Judicial officers to file financial disclosure statements.

## **Title 40**

**Section 130** - Allocation of space within the courthouse for the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia is vested in the respective chief judges.



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

NOV 27 1989

The Honorable Joseph F. Weis, Jr.  
Chairman, Federal Courts Study Committee  
22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, Pennsylvania 19106-1722

Dear Judge Weis:

I write this letter to express my thoughts on a recommendation appearing in the Draft Report on Federal Criminal Jurisdiction, and to dissent from the Report on that point. The Draft Report makes the proposal that:

[t]o the extent that Congress can provide additional federal funds for the war on drugs, those funds should be used primarily to provide federal assistance for drug enforcement at the critical state and local level, not to fund more federal prosecutions.

The rationale for this recommendation is founded on a fundamental misconception about the role of federal law enforcement in the national strategy against drugs. Limiting federal participation in the war on drugs ignores the reality of present day law enforcement. The Department of Justice has developed and followed its National Prosecution Strategy, and has forged relationships with state and local law enforcement authorities. For example, it has developed the District Law Enforcement Coordinating Committee (LECC) program for the last 8 years. The LECC's, which were established in 1981 in all 93 federal judicial districts, consist of federal, state, and local investigative and prosecutive agencies. Their goal is "to improve cooperation and coordination among law enforcement groups and thereby enhance the effectiveness of the criminal justice system."

Similarly, the Organized Crime Drug Enforcement Task Force (OCDETF) offices were created in various districts around the country in 1982 to permit the Department of Justice to coordinate federal, state and local law enforcement in an effective national strategy by establishing task forces of federal, state and local prosecutors and investigators to undertake a unified approach against drugs. Federal policy is to coordinate with local prosecutions, not to "federalize" them. Withdrawing federal

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participation in this national strategy is a step backwards in the nation's efforts against drugs.

Underlying the Committee's recommendation is an unarticulated and insupportable assumption that the increased burden on the courts is due to the federal government's straying from its federal mandate. This is simply untrue. The federal caseload has increased because we are doing what we are supposed to be doing. Cases are simply more complex; pretrial detention hearings and forfeiture proceedings require court time in excess of the traditional trial. In addition, the added complexity of the typical federal drug prosecution inevitably leads to additional court time. All of this is the result of the federal government's response to the need for stronger drug enforcement across the board.

Finally, those incentives cited in the Committee's recommendation that may now exist to bring cases into federal court instead of state court (e.g., forfeiture provisions, pretrial detention, harsher sentences) are being made obsolete as the state legislatures are following the federal government's lead in enacting stiffer laws. To this extent, the federal government has played an entirely appropriate role in providing an example for legislation and enforcement to the states. For these reasons, I dissent from the recommendation.

In several major pieces of substantive and funding legislation since 1984, Congress has made a clear policy choice that drug and drug-related cases, such as forfeiture actions and money laundering prosecutions, will be a significant part of the work load of federal courts for the foreseeable future. The Committee's report cannot ignore the political fact of life that Congress is extremely unlikely to "refocus" enforcement strategy by mandating that the federal government abandon large portions of the field in the war on drugs to the states. Nor should Congress seek to diminish the federal role in drug prosecutions. It is increasingly apparent that local drug networks have national and international roots. Investigation of the drug culture is revealing that even local drug distribution prosecutions have all the elements of a traditional federal prosecution.

The Draft Report cites the Impact of Drug Related Criminal Activity on the Federal Judiciary, (hereafter Impact Report) which recommends at least 59 additional judgeships, as supporting material for its recommendations. The Impact Report cites an impressive cluster of statistics in describing the changing scene



of law enforcement in this area.<sup>1</sup> Those statistics clearly support the need for additional funding for the federal judiciary as recommended by the Impact Report and for the additional federal judges.<sup>2</sup> The data does not, however, support the notion that by generally supporting and enforcing the above-described major pieces of legislation, the executive branch has sought to intrude into areas that the states could better handle.

The Impact Report itself largely refutes the Committee's recommendation. As it recognizes, drug cases in federal court are typically complicated, time-consuming, multi-defendant cases, frequently requiring the use of ancillary procedures, such as forfeiture actions, and the prosecution of persons who facilitate the actual drug trafficking, such as money launderers. Federal courts are often a better forum in which to accomplish these matters than are state systems, both because of the new and effective federal statutes which the Impact Report describes, as well as such factors as the generally tougher federal sentences available for drug crimes and the greater availability of prison space than for those defendants prosecuted and sentenced by state courts. The rise in federal prosecutions is not due to a flood of nickel bag "buy/bust" prosecutions; more cases that are being investigated simply match the federal profile. The federal government does not measure its success in the war on drugs by simply reviewing the number of convictions obtained. It looks to the quality of the cases brought and the size of the criminal organizations that have been successfully prosecuted.

Current federal policy rejects any attempt to intrude into areas that could as well or better be handled by the states. The executive branch has gone to great lengths to focus federal resources where they are most needed, making considerable efforts to mesh its investigative and prosecutive efforts with those of

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<sup>1</sup> The Impact Report summarizes several major pieces of legislation enacted since 1984 which have imposed additional burdens on the federal judiciary. The Impact Report notes that since 1980, the number of drug cases filed in federal district courts has increased 229 percent, whereas the total number of criminal cases filed is up only 56 percent. The Impact Report notes that even these figures understate the effect of drug cases on the federal system since, among other things, drug cases average over two defendants each -- and many have ten or more -- and drug trials now represent more than 44 percent of all criminal trials, up from 26 percent in 1980.

<sup>2</sup> The Impact Report recommends the appropriation of an additional \$269 million and the creation of 2,167 support positions in addition to its recommendation for more Article III judges. See Impact Report, p. 53.



the states. For example, the most recently published statement of overall drug prosecution strategy, the National Narcotics Prosecution Strategy, prepared by the National Drug Policy Board in early 1988 (hereafter NDPB Strategy) describes a three-level federal strategy. Overall, the "strategy is designed to ensure that state and local law enforcement authorities are properly staffed, equipped, funded, and trained to maximize the impact of drug enforcement efforts within their jurisdictions."<sup>3</sup>

Strategy 1 seeks to identify the major traffickers responsible for narcotics importation and distribution. Strategy 1 targets are defined as one of several classes of persons including those who operate significant national and international enterprises, enterprises operating within exclusive federal jurisdiction (such as on the high seas or abroad), and significant local and regional violators who have been designated for federal prosecution by an LECC.

Strategy 2 calls for "the federal government to provide training and assistance to help state and local authorities in their pursuit of large intrastate enterprises and, in some jurisdictions, to help formulate legislative proposals creating the necessary statutory tools to ensure that violators are adequately punished and their assets completely forfeited."

Strategy 3 calls for federal prosecution of those cases which must be prosecuted "in order to maintain public confidence in law enforcement, avoid the perception of gaps in narcotics enforcement, respond to urgent or developing local drug problems, and assist and complement state and local law enforcement

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<sup>3</sup> The NDPB Strategy describes how OCDETF offices have enlisted federal, state and local officials to achieve considerable success in attacking high-level participants in drug trafficking organizations. The NDPB Strategy clearly states that while a "'full court press' on the supply side of the drug equation is necessary to maintain the credibility of the message delivered on the demand side ... this fact does not necessarily lead to the conclusion that federal resources should be expended on any and all narcotics cases which may arise." To the contrary, the NDPB Strategy specifically states that "concentration on major cartels at the federal level is not to be viewed as a retreat from the cooperative efforts that have led to the success of the OCDETF program to date [and a] continuation and strengthening of those efforts will be required." The aspects of the NDPB Strategy relevant to federal, state and local coordination are reinforced in the National Drug Control Strategy, recently promulgated by the Office of National Drug Control Policy.

efforts."<sup>4</sup> To implement this Strategy, each United States Attorney is to meet with state and local law enforcement officials to coordinate enforcement strategies, yet another indication that the executive branch has no interest in wading into areas that the states could handle.<sup>5</sup>

A further indication that the executive branch has sought to encourage states to handle drug cases is the amount of federal aid already given to state courts to enable them to handle drug matters. Since fiscal year 1985, first under Justice Assistance Act Funding and then with funding provided by the Anti-Drug Abuse Act, approximately \$18.5 million has been provided by the Bureau of Justice Assistance in block grants that have benefitted state

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<sup>4</sup> NDPB Strategy, pp. 16-17 (emphasis added). One of a long list of examples of a specific program to implement Strategy 3 was a "zero tolerance" program. The current Administration has scaled back on such programs at least as they relate to the seizure of conveyances carrying only tiny amounts of drugs.

<sup>5</sup> Another indication that federal prosecutors take great pains to prosecute only those cases that the states cannot handle can be found by examining the declination policies and guidelines in United States Attorney's Offices. For example, in the Southern District of Florida, one of the judicial districts with a high drug caseload that was examined by the authors of the Impact Report, the prosecution guidelines begin with the statement that "certain offenses may be effectively handled by local authorities or in an administrative proceeding. In this way we can utilize our resources in cases where there is exclusive federal jurisdiction or a strong federal interest in the prosecution." The Southern District of Florida guidelines on cocaine cases call for the referral of seizures of less than five kilos (about eleven pounds) to the state for prosecution, except for airport and seaport seizures where seizures of less than one half a pound are to be referred to local authorities. Airport and seaport cases are, of course, highly indicative of importation, and importation cases are properly the concern of the federal government. Of the five districts described in the Draft Report with high drug caseloads, three -- the Southern District of Florida, the Southern District of Texas, and the Southern District of California -- are border districts with a large number of importation cases. The Eastern District of Virginia contains two major airports in the District of Columbia suburbs through which drugs are transported and also has a considerable amount of federal property, such as the Pentagon, over which the state has no jurisdiction.

courts or related adjudication agencies.<sup>6</sup> While this is only about 3.8% of the total expenditure of approximately \$490 million, it represents a sizeable federal expenditure. Moreover, the amount of block grant money that benefitted state court systems increased over threefold from \$1,776,000 in fiscal year 1988 to \$6,955,000 in fiscal year 1989, showing that as drug cases have mounted in state courts, federal assistance has also increased. In addition to block grants which are given to the states, the Bureau of Justice Assistance has provided another nearly \$20 million in discretionary grants to assist state and local judicial organizations from fiscal years 1986 through 1989. This represents about 15% of total direct grant money for this period.

Finally, the mere fact that smaller drug cases may appear periodically in federal court should not be taken as a sign that there has been a breakdown in federal coordination of drug prosecutions. The smaller cases brought in federal court may be a result of the increased use of drugs in areas where the federal government has exclusive jurisdiction, as on Indian reservations or in border smuggling cases. On the other hand, they may be predicates to broader investigations that are ultimately aimed at large-scale prosecutions fitting the more traditional federal profile. Smaller drug cases often form the early stages of an investigation that seeks to prosecute a pattern of substantial, ongoing criminal drug activity. In coordination with state and local prosecutors, federal investigators and prosecutors may target a criminal enterprise that is best attacked initially from the street level distributor. It is impossible, in practice, to sever out the cases that may reasonably be brought in federal court from those that can be handled in the state courts. The relationships between the investigators, prosecutors and witnesses require a coherent prosecution strategy that may counsel invoking federal jurisdiction on a dominant number of the cases being investigated. By directing money to state enforcement and away from federal enforcement, the Committee's recommendation would frustrate these cooperative efforts.

In sum, the increase in federal drug cases has been mandated by an unprecedented domestic problem. While the problem is by no means exclusively federal, it is certainly understandable, and probably irreversible, that the Congress has increased the resources for federal law enforcement. The executive branch is working with its state and local counterparts for better

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<sup>6</sup> Awards which "benefit" a court or other adjudication agency include awards for such things as training, technical assistance, information gathering, and analysis which assist directly or indirectly local courts but which do not include direct funding of court operations. A little over \$5,000,000 has gone for court operations and other "direct" assistance.

enforcement and for more effective legislation, so that the states can do more than they are now doing.

But in the meantime, until the vast majority of the states enact new and more effective laws to combat drug trafficking and create adequate prison capacity to house those convicted, the federal government will have a responsibility to step into the breach. The only alternative is to let dangerous criminals go unpunished and continue to victimize society. In fact, an important reason why federal prosecutors sometimes take cases that apparently could be handled in state courts is that they have been asked to do so by state investigators or prosecutors who believe, for one reason or another, that society will not be as adequately protected by a prosecution at the state level.

I therefore dissent from the draft report to the extent it expresses general disapproval of the increased scale of current federal drug law enforcement efforts.

Sincerely,



Edward S.G. Dennis, Jr.  
Assistant Attorney General

cc: Committee Members  
and  
Diana G.Culp, Esq.  
Robert E. Feidler  
Samuel Gerdano  
Charles Geyh  
Michael Gizzi  
Denis Hauptly  
Larry Kramer  
G. Kevin Jones  
Thomas Mooney  
Michael Remington  
Thomas Rowe  
Sara Sun Beal  
R. Scott Williams  
Joseph Wolfe





## Department of Justice

THOMAS J. MILLER  
ATTORNEY GENERAL

ADDRESS REPLY TO:  
HOOVER BUILDING  
DES MOINES, IOWA 50319

February 13, 1990

The Honorable Joseph F. Weis, Jr., Chair  
Federal Courts Study Committee  
22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, PA 19106-1722

Re: Iowa's Grievance Resolution Service

Dear Judge Weis:

I am enclosing copies of various statistical reports generated for other purposes, analysis of which will help evaluate the relative success of Iowa's system.

Several observations can be made. I think we can safely assume that 19 (FY87) to 24 percent (FY 89) of the grievances filed by inmates were resolved at the institutional or appellate level of the Department of Corrections. Those grievances, therefore, did not result in litigation in the federal courts. Secondly, grievances appear to be decreasing in number. The institution with the greatest number of grievances is Iowa State Penitentiary (the maximum security facility within the Department of Corrections' system). Interestingly, the rate of denials of grievances is greater for women (ICIW) than for the maximum security male inmate (ISP).

For your purposes, "partially sustained/other" refers to those grievances having multi-claims of which one or more were sustained, or refers to grievances, results to which were unavailable at the time of the monthly statistical compilation and were therefore carried over to the next month. "Appeal" refers to the Department of Corrections' director's designee in central office, who is the last appellate body. It appears that resolution, if attainable, is achieved at the institutional level, which is I believe as it should be.

The Honorable Joseph F. Weis, Jr.  
February 13, 1990  
Page 2

Please note that Iowa's program was initially conditionally certified. That conditional certification was based upon a superficial analysis of the application. It was, under the statute, of time-limited duration. Because of the backlog of applications, the United States Department of Justice was unable to act upon Iowa's application for certification prior to the time the conditional certification expired. There was, therefore, a lapse in time prior to the granting of full certification in January of 1987. Iowa has remained certified since that date. Please note that the average pending cases continue to increase, nearly tripling in the years between 1984 and 1989. As the statistical information distinguishing PCR's (postconviction relief applications similar to habeas corpus) and 1983's indicate, the statistics on average pending cases, while nevertheless alarming, are somewhat misleading. In 1987, the Lee County District Court opted to file all PCR challenges to disciplinary actions taken within the institution as a separate case for each disciplinary action, as opposed to a separate case for each inmate. Whereas before one inmate might have a five or six division petition, he now had six petitions with six individual case numbers.

As the court-imposed limit on population at ISP coalesces with overcrowding within the other institutions, the characteristics of the Anamosa (medium security facility) inmate change. Whereas the more aggressive disciplinary problem-prone inmate has traditionally resided at ISP, current demographics require many more of those particular inmates to reside at Anamosa. The result is an increase in PCR applications filed in Jones County, the site of Anamosa Men's Reformatory.

After you have had an opportunity to review this data, I would be very pleased to discuss your observations and conclusions if you would like. Your question to me was a request for an observation of level of effectiveness. To reiterate, I believe the statistics demonstrate that one-fifth to one-fourth of grievances filed are resolved at the institutional level and do not result in federal litigation. Unfortunately, we have not done an analysis of the nature of those complaints. Specifically, we do not know how many would fail to state a federal claim when denied at the institutional level. We can only assume then a favorable impact on the federal case load.

I am frequently asked to explain why the federal prisoner civil rights case load is so high. Frequently that question comes from the federal court itself. Personally, I believe it is difficult if not impossible to identify one or even two factors chiefly responsible. Rather, I think multiple causes are at work. Overpopulation, inmate demographics, "frivolousness"

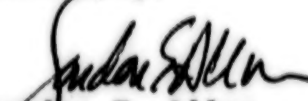


The Honorable Joseph F. Weis, Jr.  
February 13, 1990  
Page 3

standard of review on initial complaints, and history of the federal court response all add to the high number of inmate complaints.

I would be interested in your response to these statistics and again would enjoy discussing that response with you at your convenience, if you desire.

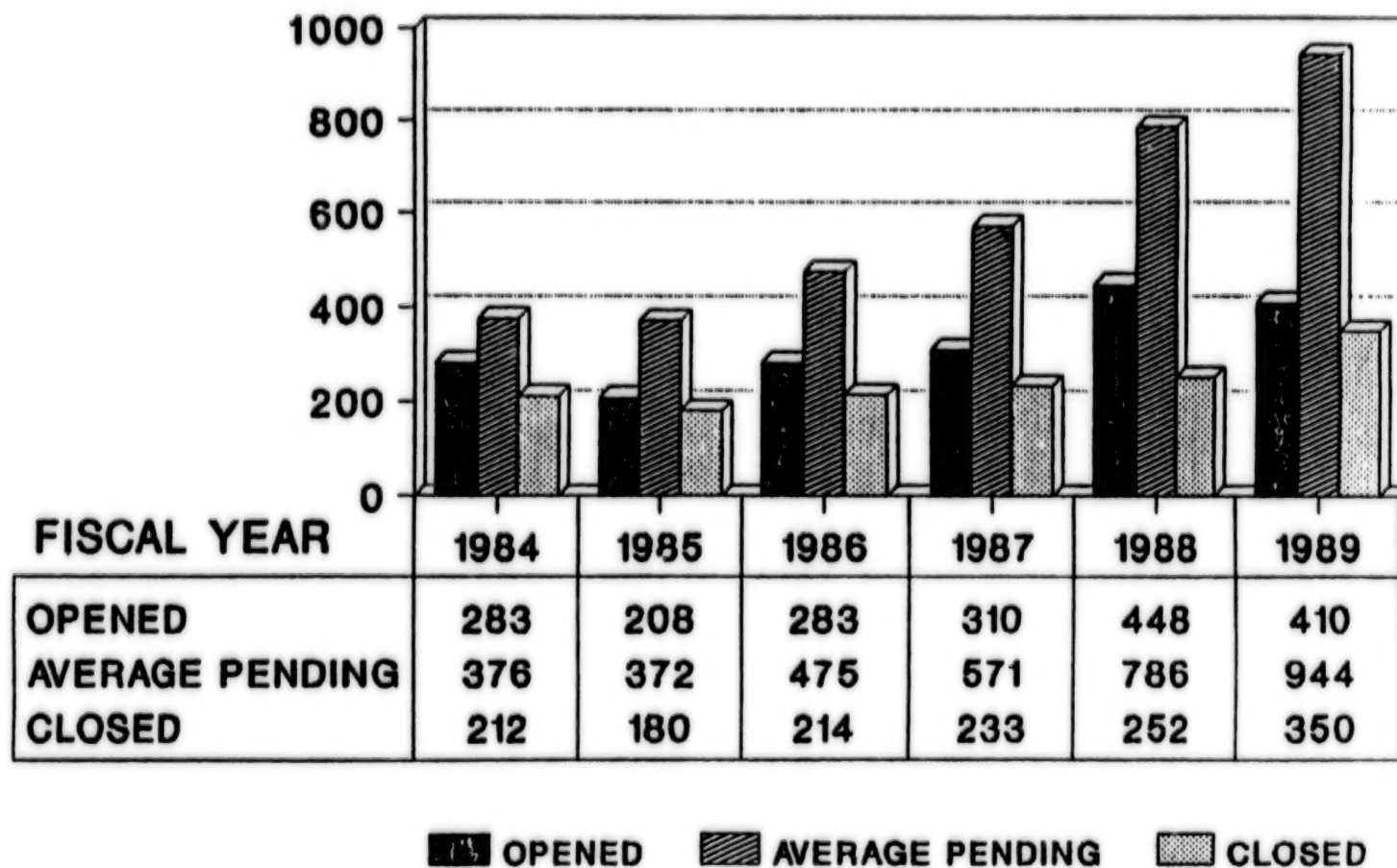
Sincerely,



Gordon E. Allen  
Deputy Attorney General

GEA/jam

# ATTORNEY GENERAL'S OFFICE CORRECTIONS' LITIGATION



STATISTICAL INFORMATION  
CORRECTIONS' LAWSUITS FILED

<u>FISCAL YEAR</u>	<u>PCRs</u>	<u>\$1983s</u>	<u>TOTAL</u>
1984	107	176	283
1985	94	114	208
1986	122	161	283
1987	153	157	310
1988	323	125	448
1989	244	166	410
1990 ( $\frac{1}{2}$ )	112	110	222 ( $\frac{1}{2}$ )

The following 10 inmates are responsible for 23% of all pending Corrections' litigation:

Wallace, Nathan  
Burgin, Laurence  
Munz, David  
Thompson, Timothy  
Mason, James  
Jones, Ferman  
Brown, Ronald  
Mills, Robert  
Harper, Ernest  
Klinsky, Ronald

CORRECTIONS' LAWSUITS FILED  
UNDER CIVIL RIGHTS ACT, 42 U.S.C. § 1983

NOTE: Iowa's grievance plan had a conditional certification from 6/17/85 until 6/24/86 and then was certified effective 1/2/87 to the present time.

7/1/83-6/31/84	176	
7/1/84-6/31/85	114	
7/1/85-6/31/86	161	Conditional Certification
7/1/86-12/31/86 (6 months)	100	
1/1/87-6/31/87 (6 months)	57	Certified
7/1/87-6/31//88	125	Certified
7/1/88-6/31/89	166	Certified
7/1/89-12/31/89 (6 months)	110	Certified

In addition, there were numerous lawsuits filed in the United States Federal Court for both the Southern and Northern Districts of Iowa which were summarily closed and never served.

# CORRECTIONS' POST CONVICTION RELIEFS FILED

## FISCAL YEAR 1989:

## FISCAL YEAR 1990 (1/2):

Lee County	193	66
Re: ISP & JBCC Ft. Madison		
Jones County	38	42
Re: IMR Anamosa		
Henry County	8	2
Re: Mt. Pleasant Correctional Facility		
Johnson County	3	0
Re: IMCC Oakdale		
Page County	1	2
Re: CCTF Clarinda		
Black Hawk County	1	0
Re: NCCF Rockwell City		
	<hr/>	<hr/>
Total	244	112

ISP - Iowa State Penitentiary, men's maximum security facility

IMR - Iowa Men's Reformatory, men's medium security facility

IMCC - Iowa Medical and Classification Center - men's and women's maximum security facility

MSU - Medium Security Unit, men's facility

CTU - Clarinda Treatment Unit, men's medium security facility

NCCF - North Central Correctional Facility, men's medium security

ICIW - Iowa Correctional Institution for Women, women's medium security unit

RRC - Riverview Release Center, men's minimum security unit.



Y 89	# FILED	# DENIED	# SUSTAINED	# PARTIALLY SUSTAINED/ OTHER	CHANGED BY AN APPEAL
SP	784	542 (69%)	101	141	1
MR	284	256 (90%)	13	15	5
MCC	205	175 (85%)	11	19	1
4SU	75	37 (49%)	3	36	0
TU	41	37 (91%)	4	0	2
CCF	44	28 (64%)	4	12	1
CIW	379	315 (83%)	29	35	3
RC	9	3 (33%)	2	4	0
<b>TOTAL</b>	<b>1821</b>	<b>1393</b>	<b>167</b>	<b>262</b>	<b>14</b>
	<b>76%</b>			<b>24%</b>	

Y 88	# FILED	# DENIED	# SUSTAINED	# PARTIALLY SUSTAINED/ OTHER	CHANGED BY AN APPEAL
SP	1077	785 (73%)	122	170	0
MR	256	228 (89%)	7	21	5
MCC	217	183 (84%)	19	15	2
4SU	94	41 (44%)	2	51	0
TU	75	56 (75%)	17	2	8
CCF	70	35 (50%)	13	22	0
CIW	329	260 (79%)	43	26	1
RC	13	9 (69%)	1	3	0
<b>TOTAL</b>	<b>2131</b>	<b>1597</b>	<b>224</b>	<b>259</b>	<b>16</b>
	<b>75%</b>			<b>25%</b>	

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SP	969	529 (54%)	111	329	0
MR	279	248 (89%)	9	22	0
MCC	179	152 (85%)	8	19	2
ISU	133	86 (65%)	5	42	3
STU	45	25 (55%)	14	6	5
JCCF	56	34 (61%)	8	14	2
ICIW	234	163 (70%)	36	35	1
RRC	16	10 (63%)	3	3	0
TOTAL	1911	1547	194	470	13
	81%			19%	

**TAX CONFLICT RESOLUTION: PROPOSED--A MODEST COURT OF TAX APPEALS**  
**Submitted to the Federal Courts Study Committee**  
**By Harold C. Wilkenfeld**

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**TABLES**

1. Comparative Analysis of Tax Appeal Opinions in 1943 and 1988
2. Comparison of Nonsubstantive Appellate Tax Opinions in 1943 and 1988

**TAX CONFLICT RESOLUTION: PROPOSED--A MODEST COURT OF TAX APPEALS**  
**Submitted to the Federal Courts Study Committee**  
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The structure for the judicial determination of disputes over United States taxes incapable of resolution at the administrative level is the result of history rather than logic.--Judge Henry Friendly. \1/

**1. Introduction:**

The most frequent criticism of the current judicial structure for the resolution of tax disputes is that sometimes years may pass before a final, authoritative, and nationally controlling, answer can be obtained from the courts. Meanwhile taxpayers and their counsel are unable to plan their affairs; and the Internal Revenue Service may be compelled to hold numerous audits in suspense, while an issue struggles upward through the judicial system. Ultimately it may reach the Supreme Court, generally after at least two regional courts of appeals have considered the issue and a conflict of decisions has ensued. While this is happening, taxpayers in different parts of the country may be governed by inconsistent tax rules. This situation is totally unsatisfactory. Among the solutions proposed at times have been the establishment of some form of national court of appeals or, more specifically, a court of tax appeals.

It is over 50 years since the idea of establishing a national court of tax appeals was first proposed. Interest in the idea has waxed and waned over the years. It is now again at the forefront and is under active consideration by this Committee. I have been studying the issue for a number of years and appreciate the opportunity to expose to you some of the results of my thinking on the subject.

This comprises part of a broader study in which I am now engaged, which is concerned with a complete overhaul of the administrative and judicial structures for the resolution of tax

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1. Judge Henry J. Friendly of the Second Circuit in Federal Jurisdiction: A General View, p. 161, see also, pp. 168-171 (1973). Judge Friendly undoubtedly had in mind the famous statement by Justice Oliver Wendell Holmes, Jr. in New York Trust Co. v. Eisner, 256 U.S. 345, 349, that "a page of history is worth a volume of logic."

disputes. Among the other issues which I am studying are: reduction of the volume of tax litigation by increasing the number of settlements at the administrative level; rationalization of the trial and appellate court structure, particularly to reduce or eliminate forum shopping by both taxpayers and government; maintaining the integrity of the United States Tax Court, which is the forum of choice of over 90% of tax litigants; protecting the Revenue from tax collection losses resulting from the prohibition on assessment and collection until the Tax Court's decision becomes final; and others.

The establishment of a forum at the appellate level for the prompt promulgation of nationally controlling tax precedents has been central to my study. I must emphasize the word "precedents." As I shall demonstrate later, relatively few appellate tax opinions have broad precedent value: most are concerned with applications of established, and uncontroverted, law to a unique set of facts. It is my view, as I shall explain, that only issues of national significance should occupy the attention of a national court, whose precedents would be binding on all other federal courts, unless modified or overruled by the Supreme Court. This does not require that all tax appeals be concentrated in a single court. Neither does it require that appellate judges who may rule upon tax appeals be tax experts. Indeed, the broader vision of generalist appellate judges is needed to counteract the tendency of tax specialists, whether in government, at the bar, or in the courts, to stake out a universe of their own. Recognition of this tendency may account for the persistent reluctance of tax specialists, both in government and in the tax bar, to endorse creation of a court of tax appeals, which would completely deprive the regional courts of appeals of jurisdiction over income, estate, and gift tax appeals.

## 2. The Limited Role of the Supreme Court:

The Supreme Court seems to be well aware of its limited role in the development of the tax law. In the early days of the income tax, when the law was much more concise and "simple" than it is now, the Court had established a number of important precedents of wide application. By 1943, however, the Court tried to relieve itself, as well as the federal appellate courts, of the burden of tax litigation by restricting the scope of appellate review of decisions of the Tax Court involving issues of fact, or mixed questions of law and fact. The Court declared in Dobson v. Commissioner \2/ that then current law regarding appellate jurisdiction to review decisions of the Tax Court required that its decisions be affirmed unless the reviewing court could

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2. 320 U.S. 39 (1943), rehearing denied, 321 U.S. 231 (1944).

identify "a clear-cut mistake of law." \3/ This made the scope of review of the Tax Court much narrower than appeals from the district courts. Many appeals affirming the Tax Court were "Dobsonized" during the short period of about five years that the Dobson rule was in effect.

This effort by the Supreme Court to relieve itself and the courts of appeals of much of the burden of tax litigation was terminated by a 1948 amendment to the law, placing appellate reviews of the Tax Court on a par with reviews of the district courts. Thereafter the Supreme Court solved its own problem by becoming more selective in exercising its discretionary authority to grant or deny writs of certiorari for reviews of tax cases. The Department of Justice cooperated by severely restricting its applications for writs of certiorari and by vigorously opposing applications by taxpayers.

### 3. The Tax Burden of the Courts of Appeals:

Unlike the Supreme Court, the courts of appeals cannot refuse to accept appeals on all of the many and varied subjects within their jurisdiction. Since 1943 the number of appeals has increased more than tenfold, while the number of tax appeals has remained stable.\4/ In spite of their importance to the Revenue and to the affected taxpaying public, tax appeals rank low in the order of judicial priorities, as compared with the heavy burden of criminal cases now arising, particularly, from the war on drugs.

Certain significant facts relating to tax appeals must be emphasized. I call your attention to Table 1, which compares tax litigation in the courts of appeals in 1943 and 1988. First, in spite of the overwhelming general increase in appeals, and in spite of the manyfold increase in the number of citizens who have been swept into the tax net since 1943, the number of tax appeals has not increased. Second, there has been an astonishing reversal in the types of tax issues being litigated. In 1943 substantive tax issues comprised 87% of the appellate opinions reported in that year: in 1988 only 40%. The corresponding increase in nonsubstantive tax issues--such as criminal cases, collection enforcement, penalties on tax protesters and promoters of abusive

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3. Dobson, supra, at 502.

4. I am indebted to Judge Richard A. Posner for insights and data contained in his seminal study and critique of the federal courts. Posner, The Federal Courts (Cambridge: Harvard University Press, 1985). As to tax appeals, compare columns 9 and 18 in my Table 1. The courts of appeals issued 230 tax opinions in 1943 and 221 in 1988.



tax shelters, awards of court costs and fees, and others-- reflects major changes in our economy and in attitudes toward voluntary compliance.\5/ Third, in 1943 appeals from the Tax Court comprised 74% of all tax appeals: in 1988 only 39%. These differences in the quantity, quality, and sources, of tax appeals require a new and different approach to the problem of how to achieve prompt, authoritative, and nationally controlling, resolution of tax issues of broad application. I shall return to my comparative analysis of tax appeals in 1943 and 1948, contained in Tables 1 and 2, in connection with my later proposal for a modest court of tax appeals.\6/

#### 4. Complexity of the Tax Law:

Aside from their volume, some tax appeals are time-consuming because of their novelty and extreme complexity. Even so great a judge as Learned Hand of the Second Circuit, in paying tribute in 1947 to his colleague, Judge Walter Thomas Swan, said:

....In my own case the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception--couched in abstract terms that offer no handle to seize hold of--leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is in my power, if at all, only after the most inordinate expenditure of time. I know that these monsters are the result of fabulous industry and ingenuity, plugging up this hole and casting out that net, against evasion; yet at times I cannot help recalling a saying of Henry James about certain passages of Hegel: that they were no doubt written with a passion of rationality, but that one

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5. Although I may be painting with a somewhat broad brush, I have classified as "substantive" tax refund suits and deficiency proceedings arising, respectively, in the district courts and the Tax Court. Conversely, I have classed as "nonsubstantive" criminal tax cases, collection and other enforcement proceedings, penalties of various types, cost awards, Freedom of Information, and other such. Details are contained in Table 2.

6. I selected 1943 because it immediately preceded two significant events: the Dobson opinion came down at the end of 1943; and Erwin N. Griswold's famous article on a court of tax appeals also followed that year. Griswold, "The Need for a Court of Tax Appeals," 57 Harv. L. Rev. 1153 (1944). 1988 is the most recent year whose fully reported tax opinions were available when this was written.

cannot help wondering whether to the reader they have any significance save that the words are strung together with syntactical correctness....\7/

Anyone who had ever been exposed to the great Learned Hand, as I was on several occasions, would know that this is sheer after-dinner hyperbole. He probably understood the law better than many a tax expert.

What must be emphasized, as Judge Hand must have recognized, is that the growing complexity of the law has decreased, rather than increased, tax litigation. The statistics show this. As the Internal Revenue Code has become more specific it has clarified controverted issues and has drawn bright lines between permissible and impermissible transactions designed, at least in part, to avoid or reduce tax liability. Recently enacted complex provisions to control the plague of abusive tax shelters are outstanding examples.

Those who think that reform or simplification of the law is possible are fooling themselves. Even tax experts despair at comprehending the whole. There are specialists whose expertise is narrowed to a few, albeit complex, sections of the Internal Revenue Code. For purposes of briefing, arguing, and deciding even the most complex issue, the focus is upon a small segment of the law, and relevant Treasury regulations and court decisions. It is not necessary to digest the entire Internal Revenue Code in order to decide a specific issue. If briefs and arguments by counsel on both sides are properly presented, there should be no mystery or magic beyond the reach of any federal appellate judge.

#### 5. The Court of Tax Appeals Idea:

The idea of vesting jurisdiction over all tax appeals in a single court of appeals is not new. It was first suggested in 1938 by Professor Roger Traynor, then consulting expert to the

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7. Learned Hand, The Spirit of Liberty, p. 161 (New York: Vintage Books, 1959). And see Judge Henry Friendly in J.C. Penney Co. v. Commissioner, 312 F. 2d 65, (C.A.2, 1962):

....The corporate liquidation provisions of the Internal Revenue Code, with their involuted cross-references, are not for reading for him who runs; to the layman they have no meaning, either plain or fancy.

See also, perhaps stimulated by the above, Friendly, "The Gap in Lawmaking-Judges Who Can't and Legislators Who Won't," 63 Colum. L. Rev. 687.

U.S. Treasury. \8/ The court of tax appeals idea was revived in a somewhat different form in 1944 in a famous paper by Dean Erwin N. Griswold of Harvard. \9/ The subject has ever since aroused considerable interest. It has had eminent sponsorship from time to time, mostly by non-tax specialists; but has been opposed vigorously by the organized tax bar.

Judge Henry J. Friendly of the Second Circuit has strongly supported a court of tax appeals, although rejecting the concept of a national court of appeals. He said in a frequently cited article:

The most compelling argument for this long advocated reform is to reduce the great lapse of time now required to procure a final resolution of disputed is-

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8. Roger J. Traynor, "Administrative and Judicial Procedures for Federal Income, Estate and Gift Taxes--A Criticism and a Proposal," 38 Col. L. Rev. 1393, 1427-1429. The proposal was tied to recommendations for decentralization of the Bureau of Internal Revenue and of the Board of Tax Appeals. This and other proposals came to be known as the Traynor Plan. Major parts of it, but not the court of tax appeals idea, were carried into effect. Much earlier, in 1925, Judge Oscar E. Bland of the United States Customs Court had also suggested that a single court handle all tax appeals. Bland, "Federal Tax Appeals," 25 Col. L. Rev. 1013, 1016. Robert Jackson, later author of the Dobson opinion in the Supreme Court, may also have been thinking along these lines in 1935 when, as General Counsel for the Bureau of Internal Revenue, he wrote:

We are getting too much law, and too many kinds of law, and too many sources, for tax administration to be simple, or the law clear. Should we reserve to the Supreme Court only constitutional questions in tax matters? Should matters of statutory construction be settled by a tax court, instead of by the twelve Circuit Courts of Appeal, with their frequent conflict of viewpoint? Should questions of fact be finally settled by the findings of the Board of Tax Appeals?

Jackson, 13 Taxes, The Tax Magazine 641, 686 (1935). Note that the "tax court" he suggested would be at the appellate level, and not the Board of Tax Appeals, whose name was not changed to "The Tax Court of the United States" until 1942.

9. Erwin N. Griswold, "The Need for a Court of Tax Appeals," 57 Harv. L. Rev. 1153 (1944). The article seems to have been stimulated at least in part by the Dobson case, which it criticizes. See pp. 1170-1173.

sues of tax law. Here, as with most of my proposals, the change would be needed even if the courts of appeals were lolling with indolence; its effect of lessening burdens upon them and on the Supreme Court is a valuable by-product. \10/

In the same article Judge Friendly advocated relieving the Court of Claims of its "wholly unnecessary and sometimes harmful tax jurisdiction", giving the Tax Court exclusive jurisdiction over tax litigation, and raising it to full Article III status as a Constitutional court. \11/

And then Mr. Griswold reappeared in 1983, proposing that more appellate courts be organized with topical jurisdiction, and reiterating his interest in a court of tax appeals. He elaborated upon this in the following cryptic footnote:

....We now have a fine and highly regarded United States Tax Court, with nationwide jurisdiction. If its decisions were final, the administration of the tax laws would be much simplified, and resolution of disputed questions on a national basis would be greatly accelerated. But, instead, we provide that appeals must go to 12 different United States Courts of Appeals, making uncertainty and delay inevitable. The situation would be much improved, and cases before the Supreme Court considerably reduced, if the United States Tax Court were reconstituted, as the old Court of Claims once grew as a trial division with jurisdiction to try refund cases remaining in the district courts, and the present Tax Court became a United States Court of Tax Appeals under art. III, with an exclusive jurisdiction to review the decisions of all trial courts in tax cases. \12/

We can now extract the major elements of the Tentative Recommendations of this Federal Courts Study Committee regarding "U.S. Tax Reform" (pp.29-33) from parallels in the most recent

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10. Henry J. Friendly, "Averting the Flood by Lessening the Flow," 59 Cornell L. Rev. 634, 644 (1974); and see Friendly, Federal Jurisdiction: A General View, pp. 161-168 (1973)

11. Friendly, "Averting the Flood," supra, n. 28, at p. 644, n. 38, and p. 652.

12. Griswold, "Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts," 2 Cath. L. Rev. 787, 806-807 (1983); see also Griswold, "Helping the Supreme Court by Reducing the Flow of Cases into the Courts of Appeals," 67 Judicature 59, 66, n. 31 (1983).



positions of Judge Friendly and Mr. Griswold. Judge Friendly's main reason for advocating a court of tax appeals "is to reduce the great lapse of time now required to procure a final resolution of disputed issues of tax law," with possible reduction of the burden of tax litigation as secondary. He favors raising the Tax Court to full Article III status, giving it exclusive jurisdiction over tax litigation, and depriving the "Court of Claims" (now the Claims Court and the Federal Circuit) of its "wholly unnecessary and sometimes harmful tax jurisdiction." Mr. Griswold does not go quite as far. He would retain the refund tax jurisdiction of the district courts (he does not mention the Claims Court) but would raise the Tax Court to Article III status and reconstitute it in a form similar to the now defunct Court of Claims, with trial and appellate divisions. The latter would have exclusive jurisdiction to review tax decisions of all trial courts, including the Tax Court's own trial division. Like Judge Friendly, this latter proposal would completely relieve the Federal Circuit, as well as the regional courts of appeals, of their tax business. The major similarities to the Committee's Tentative Recommendations are apparent. I shall offer a different solution for consideration by this Committee.

#### 6. Why Is There No Court of Tax Appeals Today?

The federal judicial system is frequently described as pyramidal, with a broad base of trial courts, fewer courts of appeals, and a single Supreme Court at the apex. This is not true of tax cases. If we regard the actual flow of tax cases, rather than the number of courts which are theoretically available, we must take into account the fact that for many years 90% or more of tax cases have been filed in the Tax Court. From there they fan out to the several regional courts of appeals, and from them to the Supreme Court. Consequently, for most practical purposes, the structure of the federal courts, in so far as tax cases are concerned, is not pyramidal but pear-shaped. This distinction is important.

If a court of tax appeals were to be established, in the form which has been proposed over the last 50 or so years, the other courts of appeals would be out of the picture. Then the court structure would be neither pyramidal nor pear-shaped. It would more closely resemble a straight line, with a very narrow base, going directly to a single court of appeals, with a broken line to the Supreme Court. At all significant points almost all taxpayers would be judged exclusively by tax specialists.

This graphic exposition points up both the strength and weakness of our judicial system for the resolution of tax disputes. While a dispute is gestating in the Internal Revenue Service, the taxpayer is opposed by the tax specialist staff of the IRS. The Tax Court to which almost all disputes go is staffed

exclusively by specialist judges. Its supporting staff of special trial judges and attorneys are also selected for their tax expertise. Almost all of the regular and special trial judges of the Tax Court spent a good part, if not all, of their previous careers in U.S. government service.<sup>\13/</sup> On the other hand, the judges of the courts of appeals are generalists, with varied backgrounds. Their specialty is judging. It is a canard to question their ability to fathom the most intricate of cases, tax cases among them. It is the responsibility of counsel on both sides of a tax appeal, as in all appeals, to assure that the court of appeals is fully and properly briefed. The consistent reluctance of the tax bar to support proposals which would completely deprive the regional appellate courts of tax jurisdiction apparently recognizes and accepts this responsibility.

The mixture of specialist and generalist judges in tax conflicts is one of the strengths of our judicial system. The weakness, however, arises from other aspects of the system. These are that (1) a decision of a court of appeals controls only within the geographic boundaries of its circuit,<sup>\14/</sup> and (2) a nationally binding judicial resolution of a disputed issue can now emanate only from the Supreme Court. The Supreme Court is generally disinclined to respond affirmatively to a petition for certiorari in a tax case unless there is a clear conflict of decisions between two or more circuits. The time lapse could be considerable.

The principal objective of the proponents of the court of tax appeals idea has been "that the important judicial function in tax cases may be speedily and surely exercised."<sup>\15/</sup> This is

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13. I do not suggest that extensive prior government experience may generate a pro-government bias. But see Benjamin N. Cardozo, The Nature of the Judicial Process. However, the Committee's proposal to concentrate all tax litigation, at both trial and appellate levels, in the Tax Court may again give rise to the complaint, which was heard in the early days of the Tax Court, that there was too close a relationship between the Treasury and the court.

14. The notable exception is the U.S. Court of Appeals for the Federal Circuit. Through the Claims Court, appeals to the Federal Circuit are available without regard to geographic boundaries. Once the Federal Circuit has decided an issue favorably to a taxpayer, any other taxpayer similarly situated would be foolish to litigate elsewhere. Unfortunately this sure thing opportunity is available only to taxpayers who can afford to pay the tax before litigating. All others are confined to the Tax Court. This mischievous and unfair aspect of forum shopping should be abolished.

15. Griswold, "The Need for a Tax Court," *supra*, at p. 1153.



of course laudable and generally agreed. Then why has it not been achieved?

From my study of reactions to the court of tax appeals idea over the past 50 years I have concluded that its failure up to now is due to its complete exclusion of the existing courts of appeals from the tax appeals process. Piling one court of specialists upon another court of specialists was just too much. Also, its proponents have failed to focus upon types of tax appeals which should produce precedents of national application.

It is really not necessary that all tax cases be appealed to a single court. The main concern should be focussed upon the prompt and authoritative resolution of precedent-worthy issues which affect many taxpayers. Few tax appeals involve issues which have precedent value. Many turn on narrow sets of facts unlikely to be duplicated in another case. It is not necessary that such cases be swept into a court whose main purpose should be to accelerate the process of producing nationally binding precedents. The proponents of the court of tax appeals idea, like the little boy with his hand in the cookie jar, by grasping at too much have achieved little more than a lot of interesting speculation. Nevertheless, there is a continuing need for issues of a precedential nature to be resolved promptly and authoritatively at the appellate level by a national court. An analysis of the types of tax issues presented to the courts of appeals is the only way to identify which should occupy the time of such a national appellate court.

## 7. The Tax Business of the Courts:

As I have just stated, the main reason that a court of tax appeals had not been established in the 50 years since the idea was first aired is that the proposal was too far reaching. What had been overlooked is that there are many civil tax issues which, by their nature, as well as for practical reasons, should originate only in a local district court and should be reviewed by a regional court of appeals rather than by a national court.

In order to understand better what would be at stake if all, or most, civil tax cases were to be appealed to a single court of tax appeals, I have reviewed all of the tax opinions reported in the two volumes of United States Tax Cases (C.C.H.) for 1988. \16/ These were analyzed in terms of the issues involved, breaking them down into substantive tax law issues and non-sub-

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16. 1988 was selected because it was the last complete year available when this was written. It may also be a watershed year in view of the major changes in tax law enacted in 1986. Other recent years give similar results.

stantive issues.\17/ A similar analysis was made for 1943. \18/ I was amazed by the very low percentages which substantive issues occupied among the total of opinions reported by the courts of appeals in 1988 as compared with 1943: only 40% in 1988, as compared with over 87% in 1943. Note also that the Supreme Court decided only 5 tax cases in 1988, as compared with 31 in 1943. Might this drastic reduction in the number of tax cases accepted by the Supreme Court indicate the Court's realization that few appellate cases in recent years have national significance as precedents? Also noteworthy is the fact that in spite of increased complexity of the law and substantial rises in the numbers of taxpayers since 1943, the number of tax appeals was lower in 1988 than 1943. This may be a tribute to the responsible tax bar, as well as to the greater specificity of the law as expressed in statute and detailed Treasury regulations.

None of the proponents of a court of tax appeals seems to have considered the nature and extent of the issues which should occupy the time of a national court of appeals, whose main function in tax cases should be to decide issues of broad application promptly and authoritatively. Such a court should not be burdened with cases which have no precedent value, or which by their nature are best handled by a local district court and regional appellate court. Tables 1 and 2 now permit a qualitative analysis to be done, by a process of elimination.

First, all are agreed that criminal appeals should be decided only by the appropriate regional courts of appeals. There were 39 of these in 1988, as compared with none in 1943. An important consideration in relation to criminal tax prosecutions is that they are sometimes selected with a view to the deterrent effect which local publicity may have upon potential tax evaders in the vicinity. They originate, and should remain, in the locality. Furthermore, there may be lurking constitutional issues should such appeals be transferred to a Washington based court.

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17. "Substantive" issues are those which determine the extent of tax liability, whether arising as deficiency proceedings in the Tax Court or as suits for refund in the district courts or Claims Court. "Nonsubstantive" issues mostly arise in the district courts in conjunction with government instituted collection or enforcement proceedings, imposition of penalties, or procedural matters. Criminal appeals are included in the latter group. See Tables 1 and 2 for comparative details.

18. 1943 immediately preceded the Supreme Court's important decision on Dobson v. Commissioner, 320 U.S. 489 (1943), reh. denied, 321 U.S. 231 (1944). It also preceded Erwin N. Griswold's famous article on "The Need for a Court of Tax Appeals."

Second, in scanning the opinions in the civil cases involving non-substantive issues one must be impressed by the fact that hardly any have precedent value. Most turn on their special facts. As shown by Table 2, focussing for the moment upon 1988, they are collection oriented, or involve the imposition of penalties of various types, or deal with various procedural points. Most are local in nature and arise in the local district courts. The nonsubstantive appeals arising in the Tax Court are of the same type.

If the purpose of a national court of tax appeals is to establish precedents of wide application, these factually oriented, non-substantive, issues do not belong there. On the other hand, a good many of them reflect a possible breakdown in voluntary taxpayer compliance. This is an element which is central to our self-assessment system. The neighbors of those who flout the law should see how they are dealt with by their local courts, rather than by a distant court in Washington.

Third, looking to the substantive issues found in the appellate opinions reported in 1988, very few of them (with all due respect) had any potential precedent value of national importance. Most turned on applications of uncontroverted legal principles to their special facts; that is, the appellate court had to decide a mixed question of law and fact. Such cases should not require the attention of a specialized, precedent creating, court.

If we eliminate issues which are best dealt with by local courts, and all others, whether substantive or nonsubstantive, which lack precedent value because they turn on unique sets of facts, what would remain for consideration by a national appellate court? And what criteria should be applied in identifying cases which involve issues of national precedential importance? I take this up next.

## 8. Proposed: A Modest Court of Tax Appeals:

### (a) Identification of Precedent-worthy Issues :

In the previous section the emphasis was upon issues which because of their local or unique factual characters could have no national precedential value. Attention will now be directed to types of issues which can affect large numbers of taxpayers and whose resolution should be accelerated by prompt reference to a court whose decisions (unless overruled or modified by the Supreme Court) should be nationally controlling. Admittedly the numbers may be small but their importance is great.

Would anyone then suggest that the jurisdiction of a national court of tax appeals be limited to "clear-cut questions of



law?" One should fervently hope that after the Dobson debacle no court of appeals should again be compelled to divert its energies to the vexing task of determining whether the issue before it is a question of law, a question of fact, or a mixed question of law and fact.<sup>19/</sup> We had enough of this from 1944 to 1948, until the Dobson case was finally put to rest. What emerges is that some other approach should be taken to identify issues of sufficient precedential importance to warrant their prompt concentration in a single court of appeals with national jurisdiction. I turn to this now.

#### (1) The Uniqueness of Treasury Regulations:

Cases involving the validity of Treasury regulations require prompt, authoritative, and nationally binding resolution. By their nature, regulations are intended to inform broad segments of the taxpaying public of the Treasury's position regarding the interpretation or application of a specific statutory provision. When the validity of a regulation is attacked the outcome is of major concern to the Treasury and to numerous taxpayers. A final decision, under present procedures, may take years, until a conflict between two or more courts of appeals develops. Not until then would the issue be considered "ripe" for review by the Supreme Court. Although the ripening of some issues through consideration by several courts until a conflict develops may sometimes be considered desirable, resolution of the validity of a regulation cannot afford the time.

All Treasury regulations are issued under statutory authority. They differ, however, in their nature and in the principles applied in testing their validity. There are three basic types of Treasury regulations: Legislative, Interpretative, and Procedural. Since this is an area well known to this body, I shall not elaborate.

What is significant, however, is an important change in the nature and extent of Treasury regulations which has been taking place in recent years. There was a time when almost all Treasury regulations were of the interpretative type, expressing the Treasury's understanding of provisions which might be ambiguous, or so tortuous as to require a verbal road map. These regulations are issued under general statutory authority to "prescribe all

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19. In Great Britain, where appeals of income tax cases are limited to questions of law, the House of Lords ruled, in effect, that any dispute which involved application of the income tax law presented a question of law. See, e.g., G.L. Peiris, "Jurisdictional Review and Judicial Policy," referring to Edwards v. Bairstow.

needful rules and regulations for the enforcement" of the Internal Revenue Code. \20/

There has been a major change in recent years, and that is in the proliferation of legislative regulations. These are promulgated under specific statutory authority to fill gaps deliberately left by Congress in many complex provisions of the Internal Revenue Code. The law is really not complete until the Treasury issues its regulations, following the general guiding principles intended to be elaborated by the specifically authorized regulations. Since such regulations are promulgated pursuant to a delegation of legislative authority, the usual test of validity is whether the regulations exceed the authority granted by the Congress.

In a rapid-reading survey of the Internal Revenue Code of 1986 I have identified 269 provisions expressly calling for the promulgation of legislative regulations. There are 71 additional such provisions in the Technical and Miscellaneous Revenue Act of 1988, requiring either new regulations or amendment of existing regulations. Also I have found 260 sections of the 1986 Code calling for procedural regulations, and 13 additional in the 1988 Act. A visit to the library will show that this secondary legislation far exceeds the underlying statute in volume.\21/

Cases directly involving the validity of regulations are relatively few. In all of 1986 and 1987 I have found only 11 cases in which the validity of a regulation was at issue. Of these the regulations were validated in 6 and invalidated in 5. But without regard to numbers each such case is important. So long as the validity of a regulation remains doubtful, the Treasury, and perhaps thousands of taxpayers, must take appropriate protective action, pending the final outcome. Meanwhile, litigation can proliferate, and many cases may have to be held in suspense pending a Supreme Court decision, should the issue finally reach there.

Because of their widespread application, promptness in resolving disputes over the validity of regulations is essential. Presently it is well nigh impossible to induce the Supreme Court to accept a tax case unless there is a conflict of decisions between two or more courts of appeals. Under present practice, if

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20. 1986 Code, Sec. 7805.

21. This trend toward leaving it to the Treasury to complete the law is probably traceable to the influence of the late Professor Stanley S. Surrey, when he was Assistant Secretary of the Treasury for Tax Policy. See Surrey, "Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail," 34 L. and Contemp. Prob. 673 (1970).

the first court of appeals to consider the issue should hold a regulation to be invalid, it is almost certain that the Treasury will continue to press forward until it can succeed in generating a conflict. This process is not only time consuming but, so long as doubt remains, litigation will proliferate. Furthermore, there would be lack of uniformity in application of the law throughout the country. This is totally unsatisfactory. I therefore urge that appeals involving the validity of Treasury regulations be centralized in a court whose decisions would be binding nationally.

Under this proposal conflicts of decision between circuits would be eliminated in so far as disputes over the validity of regulations are concerned. Petitions to the Supreme Court for grants of writs of certiorari would then have to be based exclusively upon assertion of the importance of the question. No change in Supreme Court Rules or procedures would be needed. It would be hoped, however, that the Court would adapt its policies regarding grants of certiorari to recognize the broad application of Treasury regulations. I would not go so far as to require the Court to accept review of all decisions invalidating a regulation, as had been suggested in 1940 by Randolph Paul.<sup>22</sup> However, I suggest that the correctness of the decision below should be an important factor in the Court's consideration of whether to take the case, since denial of certiorari would freeze the law as declared by the national appellate court.

There are several matters of administrative policy and procedure which are worthy of consideration when validity of a regulation is at stake. Most regulations are accepted as given, and the taxpaying public adapts itself accordingly. However, the Treasury is not infallible. In spite of the care which is given to their drafting, and the complex process for promulgating Treasury regulations, some may be vulnerable to attack on the ground that they do not interpret or apply the law correctly.

The Treasury should recognize that its interpretation is not necessarily engraved upon tablets of stone. When litigation as to the validity of a regulation ensues the normal, knee-jerk, reaction on the part of the government's litigating attorneys is to defend the regulation. It could be, however, that there is some validity to the taxpayer's position, and that the regulation deserves to be revoked or amended. Something may have been overlooked, or not given sufficient weight, until the issue reached the court.

I suggest that the Treasury should adopt procedures for the administrative review and reconsideration of regulations whose

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22. Paul, "Use and Abuse of Tax Regulations," 49 Yale L. J. 660, 684 (1940).



validity is being questioned. If this should occur in the course of administrative proceedings the Appeals Office should not simply reject the taxpayer's arguments because they are contrary to a regulation. The pendency of all disputes over the validity of regulations should be referred to the Chief Counsel, who should establish a review committee whose task it would be to take a fresh look at the regulation. This committee could consist of members of Treasury and Chief Counsel's staffs who are concerned with policy, drafting, and statutory interpretation. Litigating attorneys might also be consulted at this stage, should it be considered advisable to select an appropriate case as a vehicle for a court test. If it be concluded, as it might, that there is some validity to the taxpayer's position, appropriate action should be taken immediately, instead of forcing the issue into the courts.

The committee referred to above should maintain a "watching brief" over all pending litigation in which the validity of a regulation is involved. There should be a procedure whereby the litigating attorneys alert a designated official in the Chief Counsel's office. This procedure should apply whether the issue arises in a refund suit being handled by the Department of Justice or in a deficiency proceeding being handled by the Chief Counsel's litigating attorneys in the Tax Court. This may trigger a review and reconsideration of the regulation.

If a trial court holds a regulation to be invalid the government policy should be either to appeal the decision or to announce that it is accepting the adverse decision. If the latter, prompt action should be taken to withdraw or amend the regulation to conform to the adverse decision. If an appeal is taken the litigating policy should be closely coordinated between the Departments of Treasury and Justice to assure that the latter does not go off on a tangent, as has infrequently happened. It should be fixed policy not to forego an appeal in the hope of finding a better litigating vehicle, meanwhile leaving the matter in limbo. Once all such appeals are concentrated in a single court the circumstances of a particular case should not have much influence upon the eventual outcome. Litigating strategy should give way to the advantages of quick and authoritative decisions.

There are, it must be admitted, occasional provisions of the Internal Revenue Code whose meaning is so abstruse as to defy the best efforts of the administration, tax specialists, and the courts. If after the Executive and Judicial Branches have struggled with the meaning of the statute there is still doubt, or even dispute, over its meaning then legislative clarification is the only remaining resort. The Congressional tax writing committees, including the Joint Committee on Taxation, are presumably constantly alert to the need for clarifying legislation. So is the Treasury. It has also been suggested that a special federal commission be established, similar to the New York State Law Re-

vision Commission, to identify problems in existing statutes. \23/ But legislative solutions need not come into play until interpretative efforts by the Treasury and the courts have been exhausted. My proposal for concentrating in a single court all appeals involving the validity of Treasury regulations is designed to hasten the process of clarifying the meaning of the law or, if that not be possible, to identify promptly lacunae in the law which require Congressional attention.

## (2) Conflicts Within the Tax Court:

Among the unique features of the Tax Court is its system of internal review of the draft opinions of all of its judges. By law, each draft opinion is reviewed by the Chief Judge. The latter has 30 days to either pass it, return it to the author for revision, or refer it to the full court for review. If the full court disagrees with the draft opinion, and the author is unconvinced, the case is reassigned to another judge in the majority. Whether or not reassigned, court reviewed opinions are often accompanied by dissenting or concurring opinions. In a survey of the officially reported opinions of the Tax Court for 1988 (Vols. 90 and 91) 34 out of 157 opinions were reviewed by the full court. Of the 34 so reviewed 11 were unanimous and 23 had dissents or concurrences.\24/

When the members of this body of super tax experts differ among themselves, even though it happens infrequently, it must be apparent that the issue is not only important but that any other court would have difficulty with it. Conflict within the Tax Court itself is almost certain to invite further litigation. It should not be necessary to wait until a further conflict develops between two or more regional courts of appeals so that the issue might finally reach the Supreme Court.

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23. Henry J. Friendly, "The Gap in Lawmaking--Judges who Can't and Legislators Who Won't," 63 Colum. L. Rev. 787. See also Sidney I. Roberts, et al., "A Report on Complexity and the Income Tax," 27 Tax L. Rev. 325, 334-5 (1972); Roberts, "Simplification Symposium Overview: The Viewpoint of the Tax Lawyer," 34 Tax L. Rev. 5, 23-4 (1978).

24. I hasten to mention that the officially published opinions reflect only a fraction of the output of this very busy court. For years the Tax Court has officially published only those of its opinions which are considered to have precedent value. There are several hundred "Memorandum Opinions" annually which are published unofficially by the tax services. Dispositions by the Small Cases Division are also unpublished. Because of settlements, dismissals, and other dispositions, opinions represent only about 5% of the thousands of closings in an average year.

If an appeal is taken from a decision of the Tax Court which had been reviewed by the full court, and in which there had been dissenting or separate concurrences, it is almost certain that the conflict involves a question of law. It is unlikely that this could be illuminated or developed further by more litigation. Such conflicts, albeit at the trial level, are most appropriate for prompt resolution by a national appellate court.

(3) Conflicts Between the Tax Court and a Court of Appeals:

Appeals from decisions of the Tax Court can fan out to any one of the regional courts of appeals (with the exception of the Federal Circuit), depending upon the taxpayer's residence or principal place of business. The Tax Court considers itself to be governed only by decisions of the particular court of appeals to which an appeal would go from the case under immediate consideration. Accordingly, if it had taken a position in a previous case which had been reversed by a different court of appeals than the one to which the current case would go, and if the court of appeals which would review the current case is uncommitted, the Tax Court considers itself free to adhere to its former position. The result is a conflict between the Tax Court and a court of appeals. This may be irksome to one or more courts of appeals but the Tax Court insists upon its independence as a court of national jurisdiction. Such conflicts should be resolved promptly by a national appellate court.

(4) Interlocutory Appeals from the Tax Court:

Section 7482(a)(2) of the Internal Revenue Code, added by the 1986 Act, authorizes the Tax Court to issue interlocutory orders, as follows:

(A) IN GENERAL.--When any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order. Neither the application for nor the granting of an appeal under this paragraph shall stay proceedings in the Tax Court, unless a stay is ordered by a judge of the Tax Court or by the United



States Court of Appeals which has jurisdiction of the appeal or a judge of that court. (Emphasis supplied.) \25/

Note that by definition an interlocutory order may be issued only if a controlling question of law is involved with respect to which, it must be presumed, there is no applicable precedent. Although it is hard to imagine a question with regard to which a Tax Court judge would be willing to abrogate his responsibility for deciding this or any other question within the jurisdiction of the court, there may be rare occasions when this may happen. If it does, I suggest that all such interlocutory orders should be addressed exclusively to the national court of tax appeals.

(5) Certified Precedential Issues:

From the examination stage, or even earlier, the Treasury is aware of issues which affect large numbers of taxpayers and which may be controversial. IRS employees are alerted to these. As examinations proceed conflicts develop. Eventually they reach the courts. All agree that it now takes too long for such precedential issues to be resolved.

The Treasury Department is the organization which is best equipped to determine whether a particular issue affects a large number of taxpayers. Its litigating strategy is based upon such information. At present, when an issue seem to be capable of resolution only by litigation, the Treasury, if unsuccessful in one court of appeals, will continue to litigate until a conflict of decisions develops to justify petitioning to the Supreme Court for a writ of certiorari. In doing so test cases are selected and a certain amount of forum shopping is indulged in by the government itself. Meanwhile, the files of many taxpayers are held in suspense and tax collections are delayed. I suggest that there is a better way to achieve prompt and authoritative resolution of such issues.

Starting with the premise that the Treasury is best able to identify issues which, because they affect multitudes of taxpayers are of precedential importance, I propose that the Treasury be authorized to certify to any court of appeals that a pending appeal is of national importance and to move that the case be transferred to the designated national court of tax appeals. The Treasury's certification should specify the approximate number of

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25. This provision overruled Shapiro v. Commissioner, 632 F. 2d 170 (C.A. 2d, 1980).

taxpayers who would be affected by a prompt resolution of the issue.\26/ A minimum number should be fixed by law. I omit other procedural details at this point but they are not insurmountable. This suggested procedure would completely abbreviate the current drawn out process for resolving precedential issues by litigation.

(b) Summary:

I have entitled this section as a "Modest Court of Tax Appeals" because under my proposals only those issues would be within the jurisdiction of a national court of appeals which are specifically identified as having importance as precedents. These may be few in numbers but their importance is considerable. They include cases involving the validity of Treasury regulations, conflicts within the Tax Court, conflicts between the Tax Court and courts of appeals, interlocutory appeals from the Tax Court on questions of law, and issues certified by the Treasury as having national precedential importance. All others would proceed to the appropriate regional courts of appeals, under existing venue principles.

It is difficult to approximate how many cases might be concentrated in a national court of tax appeals under my proposals. A guess, based mostly upon my analysis of recent litigation, would be in the vicinity of 50 cases annually, consisting of about 6 regulations cases\27/, 20 conflicts within the Tax Court, 2 conflicts between the Tax Court and courts of appeals, 2 interlocutory appeals, and 20 cases certified by the Treasury as having national precedential importance. In other words, only about one-fourth of the total of tax appeals would be channeled to a national court of tax appeals. Modest but important.

9. The Uniqueness of the Tax Court:

The Committee tentatively proposes (pp.30-31) that the Tax Court be transformed into an Article III court, with exclusive jurisdiction over federal tax litigation at both the trial and appellate levels. This would be accomplished by dividing the court into a trial division and an appellate division. Technical details aside, this would essentially convert the Tax Court into something resembling the now defunct Court of Claims.

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26. This could apply to all issues of wide application, whether substantive or nonsubstantive.

27. This number may increase substantially in future years as the numerous regulations required by the 1986 and later Revenue Acts come on stream.

The Tax Court has proven itself as a model of a specialized trial court since its original inception in 1924. It is the trial forum of choice for 90 to 95% of tax litigants. The others, whatever their reasons, choose to pay the tax and litigate in the local district court or the Claims Court. Undoubtedly, a major attraction of the Tax Court, aside from its special expertise, is the fact that assessment and collection of the disputed tax is deferred until the decision of the Tax Court becomes final.\28/

The collegiality of the Tax Court is unique. Although each judge sits as a separate division of the court, all draft decisions are required by law to be reviewed by the Chief Judge. Any which depart from prior court precedent are either returned for revision or are assigned for review by the entire court. So also any which establish a precedent or are otherwise considered of sufficient importance, or controversial, to warrant review by the entire court. All of the regular judges participate in court review. Nonparticipation is noted. These en banc and internal review procedures are the central elements which have established the Tax Court as the principal source of tax precedents within our judicial system. Splitting the court in two, or otherwise fragmentizing it as proposed, would diminish, if not destroy, this important feature.

It should also be recognized that for all practical purposes the Tax Court is already essentially two courts. There is a very successful Small Cases Division whose procedures differ materially from the court's regular activities. Taxpayers whose disputes come within the jurisdictional limit (\$10,000), and who elect to file in this division, pay lower filing fees and follow simpler procedures. Hearings are conducted by the Tax Court's special trial judges, rather than the regular judges. Most taxpayers appear pro-se. The proceedings are informal. Although not advertised as such, they seem to resemble arbitration proceedings more than trials. Decisions of the Small Cases Division are final and unappealable. This is alternative dispute resolution par excellence. It helps to maintain taxpayer morale among the mass of "small" taxpayers who, for whatever reasons, choose to bypass the Internal Revenue Service's administrative appeal procedures and to be heard by an impartial judge in an adversary proceeding.

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28. This feature does not seem to have been diminished by the fact that statutory rates of interest upon unpaid deficiencies have been increased substantially, and that tax deductions for interest payments have been reduced or eliminated. There are sanctions for instituting a Tax Court proceedings primarily to delay payment of the tax.



Another feature of the Tax Court is that since its inception it has served as a catch basin for thousands of cases annually which the IRS had been unable to settle administratively before issuing a notice of deficiency. Sometimes this catch basin comes near to overflowing, as happened in recent years with the sudden deluge of tax shelter cases. Since the filing of a proceeding in the Tax Court tolls the running of the statute of limitations upon assessment and collection, this buys more time for the IRS to engage in settlement negotiations with the petitioners. More than 80% of Tax Court closings result from settlements. The Tax Court could not survive otherwise. Many of these settlements result from both sides being compelled, perhaps for the first time, to evaluate the strengths and weaknesses of their cases while under the pressure of preparing for trial. Thus, the Tax Court is an important, and far from passive, partner in the resolution of disputes alternatively.

The Tax Court has proven itself as an institution which works well at the trial level. To turn it into a hybrid consisting of both a trial division and an appellate division would throw it completely off balance. Two courts under one roof just won't work. Eventually they would have to be separated, as happened to the Court of Claims. I submit that most, if not all, of the purposes toward which the Committee's proposal is directed can be achieved without such drastic disruption of a system which by and large is functioning not too badly.

#### 10. The Proposals of the Federal Courts Study Committee:

I take up the Committee's objectives in the order stated at p. 31.

##### (1). Reduce Forum Shopping:

The Tax Court is the trial forum of choice of 90 to 95% of tax litigants. The others, having paid the tax, cannot go to the Tax Court but are limited to either the local district court or the U.S. Claims Court. Few choose the latter; and the number seems to be decreasing since the Claims Court was split off from the old Court of Claims.

In spite of its pejorative tone, "forum shopping" is not all that bad. Its worst element is that decisions of the Claims Court are reviewable exclusively by the U.S. Court of Appeals for the Federal Circuit, instead of fanning out, as do appeals from the Tax Court and the district courts, to the regional courts of appeals. As a result, should the Federal Circuit decide a particular issue favorably to a taxpayer all other taxpayers similarly circumstanced would flock to the Claims Court. The only catch is that this opportunity is limited to those taxpayers who can afford to pay the tax and engage skilled counsel. This had

given the old Court of Claims the reputation of being a rich man's court. The impecunious are limited to the Tax Court, if they can afford to litigate at all.

The worst aspect of forum shopping would be eliminated if the venue rules regarding appeals from the Claims Court were amended to conform to appeals from the Tax Court. This would reduce the tax business of the Claims Court and the Federal Circuit without, I suspect, a corresponding increase in the work of the other trial and appellate courts.

I also propose that the Tax Court be given concurrent jurisdiction with the district courts and Claims Court over all tax refund suits.<sup>29/</sup> At first blush this would seem to broaden forum shopping opportunities. The reverse is true, since the flow would be only in the direction of the Tax Court, which should be encouraged.

Other than the above, the choice of forum opportunities which would remain should be retained. Both history and logic require this. Taxpayer voluntary compliance is a delicate flower which must be cultivated constantly. We seem to be going through a period when it is at a low ebb. (Pardon the mixed metaphor.) Although few taxpayers choose to sue in the local district courts (perhaps fewer if my recommendations are implemented) the fact that they are available is an important element in the relationship between taxpayers and the government, at both the administrative and judicial levels. This aside from the sticky constitutional question whether taxpayers can, or should, be deprived of the right to jury trials available only in the district courts. As to the Claims Court, if the appeal route is changed, as I recommend, its tax business may die on the vine. No specific legislation is required. In sum, with the changes I recommend a reasonable choice of forums will remain and the most harmful aspects of forum shopping will be eliminated.

## (2) Simplify Tax Adjudication:

Vesting jurisdiction over specific tax appeals in a single, national, court of appeals would accomplish this, as I shall recommend later. My other recommendations are also directed to this end.

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29. I definitely do not recommend the reverse: that the district courts and Claims Court be given concurrent jurisdiction with the Tax Court over tax deficiency proceedings. That would be totally disruptive.

(3) Relieve Pressure on the Article III Courts:

This is desirable but, as my previous analysis shows, the numbers are far less than seems to have been assumed. If we target cases which are worthy, because of their precedential value, to be concentrated in a national court of appeals, I estimate that this would be about 50 annually. But cases of this nature are more time consuming than run of the mill tax cases, and the relief may far exceed the numbers. Furthermore, once precedents of national import are established they will discourage further litigation. Efforts to produce conflicts of circuits should cease. The total number of tax appeals should drop.

(4) Reduce the Pressure on the Supreme Court to Resolve Intercircuit Conflicts:

Vesting precedent-worthy appeals in a single court would eliminate almost all efforts to generate a conflict of circuits. If one should develop in respect of an issue not sufficiently important for decision by the national court, it should be possible to oppose a petition for certiorari successfully on the ground that the issue lacks national importance. On the other hand, the Supreme Court would no longer expect a conflict of decisions when requested to review tax decisions of the national appellate court. Importance of the issue, if satisfactorily demonstrated, should suffice.

(5) Access to an Article III Court:

I favor elevation of the Tax Court and its regular judges to Article III status, but for a reason not mentioned by the Committee. Under my proposal, about three-quarters of tax appeals would remain in the regional courts of appeals. It would help these courts considerably if, when tax appeals arose, at least one member of the judicial panel was a judge with tax expertise. The judges of the Tax Court constitute a unique and valuable judicial resource which is not being utilized fully. If the Tax Court judges had Article III status they could occasionally sit, by designation, on the courts of appeals, as is so frequently done by district court judges.

Furthermore, serious consideration should be given by those who make judicial appointments to the occasional elevation of outstanding Tax Court judges to one or more courts of appeals. It has been stated that former district court judges comprise about 40% of the circuit court judges and that they are the most frequent visiting judges on the circuit courts.<sup>30/</sup> Why not also Tax Court judges? Nor do I suggest that the Tax Court is the

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30. Posner, The Federal Courts, pp. 229-230.

only source of tax expertise. We have an unusually able tax bar, some of whose outstanding members might be willing to forego a lucrative practice for the challenge and prestige of a court of appeals judgeship. Eminent professors of tax law, of whom there are many, should also not be overlooked. A suitable criterion for appointment of tax experts to particular courts should be the average distribution of tax appeals among the several circuits. See Table 1, column 18.

If one or more tax specialists were to be appointed as court of appeals judges, they would add an element of expertise to the tax decisions of their courts. The mix of two generalist judges to one tax specialist would be beneficial. The specialist judge need not necessarily be assigned to write the opinion for the court. Indeed, there may be occasions when the specialist may be in the minority. However, the quality and precedent value of tax opinions emanating from a court with at least one judge who is a tax expert would be enhanced. This would be so even if the opinion of the specialist judge were to be dissenting or concurring. At least, the issue would be more fully illuminated. Conversely, since the tax specialist would not be fully occupied with tax cases, and would necessarily sit on nontax cases, his own legal horizons would expand, and make him a better all around judge.

(6) Increasing the Quality and Uniformity of Tax Adjudication:

Undoubtedly, concentrating issues of precedential worth in a single appellate court would increase the quality and uniformity of adjudication. However, as I have pointed out, relatively few tax appeals produce precedents and a good many, by their nature, should remain in their geographic locality rather than being shifted to a Washington based court. I believe that my analysis and proposals will, certainly in the long run, achieve the desired purpose of lightening the tax case burdens of the trial courts as well as of the courts of appeals.

11. Choosing a National Court for Tax Appeals:

Although I differ in some important details from the Committee's proposals, I do favor the concentration of important tax appeals in a single, national, court of appeals. The question is, which court?

We already have two national appellate courts sitting in Washington--the United States Court of Appeals for the District of Columbia and the United States Court of Appeals for the Federal Circuit. Each has some appellate tax jurisdiction, the distribution of which between them withstands reason or logic. Establishing a third appellate level court to decide about 50 pre-



cedent-worthy tax cases annually would be a waste of good talent. Nor would there be any reason to add to its jurisdiction cases which would have no precedent value, simply to keep it busy.

There have been recent proposals to convert the Federal Circuit into the court of tax appeals. Perhaps this was stimulated, like efforts to climb Mount Everest, simply because it was there. That court has no particular tax expertise and, if my recommendation that it be divested of its exclusive review of Claims Court decisions is approved, it will have even less.

The other possible candidate for consideration as the exclusive appellate court for selected tax appeals is the Court of Appeals for the District of Columbia Circuit. This court has recently been relieved of some of its purely local business and may be available for new assignments.

I would like to finesse the question of which of these two national courts of appeals should be selected as the court of tax appeals by asking another question. Putting their origins and histories aside, is there any logical reason for having two separate courts of appeals, with national jurisdiction, both of which are mainly concerned with matters of federal law and administration? Instead of trying to sort out their respective jurisdictions, in the tax and other fields, would it not improve the structure and operations of the federal courts in all fields if these two courts were merged into one? Then the unified court would be the logical choice for receiving all tax appeals which are to be decided by a national court.<sup>31/</sup> It might be reenforced by one or two judges who are tax specialists, as suggested above, as well as by staff attorneys with tax expertise. As a circuit court, it should sit, for the convenience of the parties, in designated cities throughout the country.

## 12. Summary--Objectives and Proposals:

The main objective of concentrating tax appeals in a single court with national jurisdiction is that cases involving important tax precedents be decided speedily and authoritatively. A second objective, also important, is to reduce the burden of tax litigation on the trial and appellate courts. My proposals are directed toward both these ends.

---

31. I realize that in recommending a merger of the U.S. Court of Appeals for the District of Columbia and the U.S. Court of Appeals for the Federal Circuit I may have overstepped the intended ambit of this paper. I have done so only because of the difficulty in choosing between two courts, neither one of which, alone, may be able to handle the additional tax appeal burden.

I have identified five types of issues which are of precedential nature and which should be decided promptly by reference to a national appellate court. They are (1) the validity of Treasury regulations, (2) conflicts within the Tax Court, (3) conflicts between the Tax Court and a court of appeals, (4) interlocutory appeals from the Tax Court, and (5) issues certified by the Treasury as having precedential importance. In numbers, these may total about 50 annually, or about one-fourth of the average of tax appeals in recent years. The others, being of local character, or of lesser precedential value, would remain in the regional appellate courts.

Considering the relatively small number of appeals which would justify reference to a national court, it is apparent that establishing a separate court for tax appeals would be wasteful. The search, therefore, is for an existing court to which precedent cases should be directed. There are already two appellate courts with national jurisdiction in Washington--the U.S. Court of Appeals for the District of Columbia and the U.S. Court of Appeals for the Federal Circuit. Although neither is a court of tax specialists both have some exposure to tax appeals. A choice between them is difficult. I suggest that they be merged and that, to aid in the decision of tax appeals, one or two tax specialists be appointed as judges of the combined court.

Under my proposals the tax burden on the trial and appellate courts would be lightened in several ways. Efforts by litigants to achieve conflicts among the circuits in issues of precedential nature would be eliminated. Similarly, issues worthy of consideration by the Supreme Court, because of their national importance, would be readily identifiable. Forum shopping would be reduced to reasonable proportions by giving the Tax Court concurrent jurisdiction over tax refunds and by eliminating the exclusive review of the Claims Court by the Court of Appeals for the Federal Circuit. Raising the Tax Court judges to Article III status would make them available for occasional assignment to trial or appellate courts, to assist in the disposition of complex tax cases. Tax specialists might be appointed as judges to those courts of appeals which have the heaviest tax dockets.

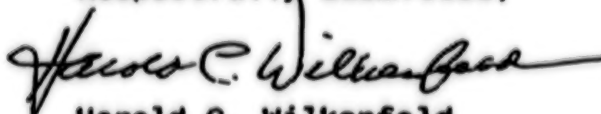
The flow of tax cases to the courts is a function of the activities and policies of the Internal Revenue Service. Relatively few of the conflicts generated by IRS examinations reach the courts. Most are resolved by the administrative appeal procedures of the IRS. However, a large percentage of conflicts still bypasses the available administrative remedies. Recently enacted statutory provisions may induce more taxpayers to exhaust the administrative remedies before resorting to litigation. The trial and appellate courts can also participate in this effort by applying available sanctions, by way of denial of costs or imposition of damages or other penalties, against parties who engage



in frivolous litigation or whose principal purpose in litigating is to delay payment of tax which may be due.

Still, tax litigation can and should continue. It is an important outlet for the maintenance of taxpayer morale. Any change which is made within the judicial system should be sensitive to maintaining and improving the relationship between the tax authorities and the taxpaying public. The objective should be to bring about needed improvements with the least disruption to the existing system. My proposals, I submit, are so directed.

Respectfully submitted,

A handwritten signature in cursive script, reading "Harold C. Wilkenfeld".

Harold C. Wilkenfeld  
January 1990

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— 1943 and 1988 —  
 Comparative Analysis of Tax Opinions in U.S. Courts of Appeals  
 As Reported in 1943 and 1988 Volumes of U.S. Tax Cases (C.C.H.)

637

1943

1988

COURTS OF APPEALS	1.	2.	3.	4.	5.	6.	7.	8.	9.	10.	11.	12.	13.	14.	15.	16.	17.	18.
	District Court Appeals			Tax Court Appeals			TOTAL 1943 OPINIONS			District Court Appeals			Tax Court Appeals			TOTAL 1988 OPINIONS		
	SUBSTANTIAL			NON-SUBSTANTIAL			SUBSTANTIAL			SUBSTANTIAL			SUBSTANTIAL			SUBSTANTIAL		
	SUBSTANTIAL	NON-SUBSTANTIAL	SUB-TOTAL	SUBSTANTIAL	NON-SUBSTANTIAL	SUB-TOTAL	SUBSTANTIAL	NON-SUBSTANTIAL	1943 TOTAL	SUBSTANTIAL	NON-SUBSTANTIAL	SUB-TOTAL	SUBSTANTIAL	NON-SUBSTANTIAL	SUB-TOTAL	SUBSTANTIAL	NON-SUBSTANTIAL	1988 TOTAL
CA1	4	0	4	5	0	5	9	0	9	0	5	5	2	0	2	2	5	7
CA2	2	3	5	29	3	32	31	6	37	4	11	15	7	0	7	11	11	22
CA3	5	2	7	20	0	20	25	2	27	2	3	5	1	2	3	3	5	8
CA4	1	1	2	4	0	4	5	1	6	4	5	9	1	0	1	5	5	10
CA5	3	0	3	21	2	23	24	2	26	1	10	11	5	7	12	6	17	23
CA6	5	4	9	28	2	30	33	6	39	6	11	17	1	4	5	7	15	22
CA7	5	2	7	16	1	17	21	3	24	5	7	12	14	1	15	19	8	27
CA8	1	3	4	8	1	9	9	4	13	2	14	16	5	2	7	7	16	23
CA9	11	3	14	22	1	23	33	4	37	4	16	20	13	9	22	17	25	42
CA10	3	1	4	7	0	7	10	1	11	0	8	8	6	1	7	6	9	15
CA11	—	—	—	—	—	—	—	—	—	3	10	13	2	2	4	5	12	17
APP. D.C.	0	0	0	1	0	1	1	0	1	0	3	3	1	1	2	1	4	5
TOTAL	40	19	59	161	10	171	201	29	230	31	103	134	58	29	87	89	132	221

OTHER COURTS	1943			1988		
	SUBSTANTIAL	NON-SUBSTANTIAL	TOTAL	SUBSTANTIAL	NON-SUBSTANTIAL	TOTAL
CT. CLS.	11	3	14	—	—	—
FED. CIR.	—	—	—	6	1	7
SUP. CT.	15	6	31	4	1	5

Comparison of Non-Substantive Tax Opinions in Courts of Appeals,  
Court of Claims and Federal Circuit,  
As Reported in 1943 and 1988 U.S. Tax Cases (C.C. H.)

Issues	1943	1988
Criminal	0	39
Collection Oriented:		
Lien, Levy, Distraint	3	18
Summary Enforcement	0	6
Bankruptcy	1	4
Transferor Liability	2	1
Impenchant	2	2
Miscellaneous One of a Kind Issues in 1988	0	4
Penalties:		
Responsible person's failure to withhold	1	6
Tax Protesters / Frivolous Proceedings	0	10
Fraud and sham Transactions (e.g. Tax Shelters)	0	3
Failure to file	1	1
Procedural:		
Costs and Attorneys Fees	0	7
Jurisdiction	6	11
Evidence and Burden of Proof	8	2
Statute of Limitations	6	5
Freedom of Information	0	3
Returns - Validity	0	2
Estoppel	1	1
Miscellaneous One of a Kind Issues in 1943	2	0
Miscellaneous One of a Kind Issues in 1988	0	14
	33	138

(Slight discrepancies between total issues and total opinions is  
due to some opinions having more than one issue)

## A PROPOSAL FOR A UNIFIED COURT OF APPEALS

The structure of the United States Courts of Appeals is one of the crucial issues facing the Federal Courts Study Committee. Indeed, our chartering statute explicitly recognizes the problem by specifying that we address intra-circuit and inter-circuit conflicts.

To begin our review, it is helpful to recount the historical background to better understand how and why the issue of inter-circuit conflict arose. The Circuit Courts of Appeals were created in 1891 as adjuncts to a trial court -- the Circuit Court. The judges of the Circuit Court of Appeals consisted of circuit judges (who performed trial duties), a circuit justice (who sat only in rare instances), and in the circuit justice's absence, a district court judge. These Circuit Courts of Appeals were composed generally of three, and at times, two judges. Their mission was conceived as error correction, rather than law giving. The circuit judges' dual trial and appellate responsibilities continued until 1911 when the Circuit Courts (the old federal trial courts) were abolished, the Circuit Courts of Appeals remaining as appellate bodies.

As the volume of appeals rose, the supervisory capacity of the United States Supreme Court diminished and the number of circuit judges grew. The Courts of Appeals became increasingly regionalized, eventually considering themselves autonomous -- answerable only to the Supreme Court. Precedents established by



other Courts of Appeals were followed only when the reasoning from sister circuits was considered persuasive. Each court jealously defended its prerogative to flatly disagree with, and to therefore explicitly not follow, precedents of another Court of Appeals.

This balkanization of federal law emerged gradually, arousing little opposition along the way. Soon, divergent holdings from separate circuits became accepted as an integral element in the "percolation" process, which was defended as a means to arrive at the "correct" decision on a particular issue.

Advocates of percolation pay little heed to the costs endemic to the process and the burdens it places on the Supreme Court to resolve conflicts on issues of statutory interpretation that should otherwise not require certiorari. Fomenting circuit conflicts has become a recognized tactic of litigants, particularly governmental agencies, scavenging the circuits until they win approval for policies they espouse. The non-binding effect of precedents beyond circuit geographical limits preserves issues for relitigation in twelve different forums, thus duplicating efforts and weakening the stature of the regional Courts of Appeals.

In short, condoning deliberate inter-circuit conflicts promotes inefficiency and waste of scarce appellate resources. The practice runs counter to the fundamental theory of uniform application of federal law, ignoring the principle that unless



explicitly stated otherwise, congressional enactments are to be administered consistently throughout the nation.

Intra-circuit conflicts are rarely created deliberately, and are often the result of inadvertence or justified by distinguishing factual circumstances. These inconsistencies have been characterized as "attitudinal aberrations." This type of conflict generally does not implicate intentional preferences between competing policies; consequently, its occurrence is less disturbing and different remedies are appropriate.

My proposal for a unified Court of Appeals is based fundamentally on the concept that this entity should be a national court, not a collection of semi-independent judicial organizations. It is consistent with Rosco Pound's classic model of a three-tiered judicial structure -- a trial court, intermediate appellate court, and a supreme court.

Administrative difficulties are evident. A court of 168 judges -- or a larger number as, unfortunately, seems almost inevitable -- could not function effectively through one clerk's office or with panels serving at-large throughout the country. A more desirable and efficient system would be to divide the nation into areas that would be served by divisions of no more than nine circuit judges. Individuals would be appointed to these specific divisions, continuing to serve there until they took senior status or unless assigned to the central division,

discussed later in greater detail. Each division would have its own clerk's office and administrative facilities.

By limiting the size of a division to nine judges, collegiality would be enhanced, an esprit de corps would develop, and working conditions would undoubtedly be more pleasant. The local bar would become better acquainted with the members of the court. Presumably, this familiarity would allow practitioners to better predict the likely outcome of an appeal, thus encouraging settlement and more informed appraisal of the likelihood of success on appeal. Establishment of these divisions would, of course, result in elimination of the presently existing circuits and their geographical boundaries.

Because the divisions would function as part of a unified court, Congress might authorize the Judicial Conference to monitor and realign the geographical boundaries as the number of appeals fluctuated so that the judicial membership could remain at nine. This would eliminate the prolonged political battles that so often occur in realignment of the present circuits.

The sheer volume of appeals has dictated a reliance on disposition by panels of three Article III judges. No practical alternative to that system has been suggested, and I suspect that the concept will continue to govern the intermediate appellate process. Currently, the Courts of Appeals operate on the principle that members of the court -- and the district courts -- are bound by precedent set by a panel decision unless it is

overruled by the Court in banc, or by the Supreme Court. That same principle could be applied to a unified court.

When it is suggested that the same generalized reliance on precedent set by a three judge panel as occurs today in the individual circuits could be extended to a national unified court, a flurry of vague, undifferentiated objections are raised. Whether these concerns are justified or logical is debatable. If it be conceded that the precedent established by a three judge panel effectively controls in an area as vast as the present Ninth Circuit, extension of the principle nationwide would seem to be consistent and workable, with exceptions that I will discuss later.

The Courts of Appeals conduct their day-to-day business on the theory that three Article III judges can be trusted to conscientiously and intelligently resolve the cases submitted to them. That fundamental assumption should not become suspect simply because a large geographical region is affected. After all, a decision handed down by a Supreme Court established by statute to consist of three Justices would be binding nationally in the identical manner as the holding of a Court whose membership is set at nine.

The purported advantage of percolation is often raised as an objection to the establishment of precedent by the first panel to reach an issue. I am not persuaded that the benefits of percolation justify its costs, both in terms of uncertainty in

the law and in increased litigation and uneven application of legal principles on a geographic basis.

There would be, concededly, a need for a mechanism to correct the situation caused by inadvertent, inconsistent panel decisions, or the comparatively few instances when the first panel decision was erroneous. This could be accomplished by the Supreme Court in a few cases, but the primary responsibility should lie with the unified Court of Appeals. It created the problem and it should cure it, rather than relegating its resolution to another, separate appellate court created for that purpose.

This error correction mechanism within the unified court could take a variety of forms. It could consist of ad hoc panels of five or seven judges, or could be a standing entity to which judges would be assigned for a period of months, or years, or permanently. If necessary, it could consist of judges who specialize in certain areas of the law, although I favor the traditional, generalized judicial approach. The corrective entity could be unitary, or it could function through three or four bodies assigned to large geographic areas. That choice, I believe, would be dictated by the volume of anticipated work. For purposes of discussion, I will refer to the mechanism eventually selected as the "Central Division."

In whatever form it takes, the Central Division should be staffed by circuit judges equal in rank to those who sit on the three-judge panels. This provision would insure that the

Central Division remain consistent with the concept of a unified court, reduce the possibility of divisiveness, and guard against a weakening of the three-judge panels. Some qualifications for service on the Central Division might be thought suitable, such as prior service of five or ten years as a circuit judge. Salary should remain the same for all circuit judges.

Designation of judges to serve in the Central Division for periods of time might be made by a neutral body, such as the Judicial Conference or the Circuit Councils. Headquarters for the Central Division or subdivisions preferably should be located outside Washington, D.C. -- perhaps in the midwest -- to emphasize the unitary but independent character of the division.

Cases would reach the Central Division in three ways: by certiorari from the original decisions of a panel; in subsequent litigation by certification from other panels which question the correctness of the original holding; or by litigants in subsequent litigation who would concede the applicability of the original panel decision, but challenge its correctness. Whether recourse to the Central Division should be a prerequisite for certiorari to the United States Supreme Court is a question worthy of further study. In no other fashion would the jurisdiction of the Supreme Court be affected.

A number of positive features would flow from unification:

1. The status of the Courts of Appeals would be enhanced, making service on the Court more attractive to those men and women who would be desirable additions to the bench.

2. The increased stature of a unified court would make it more difficult for state supreme courts to resist efforts to have some federal questions channeled first to the Court of Appeals, rather than directly to the United States Supreme Court as the present statute provides.

3. Deliberate inter-circuit clashes would be eliminated and inadvertent intra-court conflicts would be resolved internally.

4. Forum shopping and "non-acquiescence" by governmental agencies would be lessened if not eliminated.

5. A unified court would offer flexibility in its operations both at the panel and Central Division levels, thus facilitating introduction of innovative procedures.

6. Because no separate fourth tier would be necessary, the inherent problems of filling vacancies in such a forum would be sidestepped entirely. Vacancies in a unified court could be accommodated with less difficulty than in a new, separate court.

7. The collegiality and mutual assistance likely to develop among judges in a nine-person division would be an improvement over that possible in large circuits as they exist today.



8. Prolonged disputes over geographic realignments could be substantially reduced, if not eliminated altogether.

This proposal for restructuring the Court of Appeals does not deal with the organization of the current circuit councils. These administrative entities could be reorganized in geographic areas quite independent of those allocated to the various divisions, with councils including areas encompassing a number of divisions.

The proposal for a unified court is not original. It was suggested more than fifteen years ago in various forms by Professor Maurice Rosenberg, Dean Griswald, Professor Paul Carrington, Professor Erwin Surrency, and others. It is interesting to speculate where we would be today had the plan been adopted years ago.

This proposal is the most sweeping of those the subcommittee has considered, but the crises we now face and are likely to confront the courts in the next twenty-five years demand substantial restructuring of the present system. Realistically too, any fundamental restructuring will take years of congressional consideration. Such efforts should begin soon. The comfort bred of mere familiarity with the present system should not serve to delay anticipation of, and attention to, the needs of the future.

Joseph F. Weis, Jr.

# memorandum

DATE: September 15, 1989

REPLY TO  
ATTN OF: Jeff Barr

SUBJECT: Re: Non-structural solutions to the problem of intercircuit conflicts

TO: Chief Judge Campbell

RECEIVED

SEP 16 1989

You have requested me to review the literature on the problem of intercircuit conflicts and summarize the best proposals advanced by commentators to deal with the problem using existing judicial resources. I list those proposals below.

1. A rule of three circuits. Judge Richard Posner in The Federal Courts, at p. 165, suggests that "[t]he problem of unresolved conflicts between circuits would be ameliorated if each circuit adopted a policy of automatically deferring, other than, perhaps, in cases of great significance, to the resolution of any issue of law by three circuits, so that if the first three circuits to consider an issue agreed on how it should be decided the remaining circuits would consider themselves bound by the decision. Of course, the first three circuits might get the issue wrong; but the probability is sufficiently small to be outweighed by the benefits to judicial economy from deeming the matter closed." This idea would indeed resolve conflicts without adding to the workload of federal appellate judges. It would cut off the percolation process, but only at a point where considerable percolation already will have occurred. Although the idea would invite a certain amount of forum shopping, the participation of three circuits in

formulating a national rule would pose less serious forum shopping problems than would according national stare decisis effect to every court of appeals decision.

2. National Stare Decisis. A number of commentators have suggested the possibility that decisions of each court of appeals should bind the courts of appeals throughout the entire nation. Under this conception, each court of appeals panel essentially would render decisions as a panel of a unitary national court of appeals. Under most formulations of this idea (including, most prominently, that of Justice White), a circuit could decline to follow the ruling of a sister circuit only by convening an en banc panel, whose decision would thereafter be binding throughout the entire federal system unless overturned by the Supreme Court.

An alternative formulation, suggested by William T. Coleman, Jr. in an article at 52 Fordham L. Rev. 1, 18-19 (1983), would provide that when a circuit renders a decision that is in conflict with a prior decision of another circuit, the losing party could petition the court for a rehearing before a special seven-judge panel. That panel would consist of three judges from each of the two circuits in conflict and a seventh judge to be assigned from another circuit by the Chief Justice. The panel's decision would bind the nation, subject of course to discretionary review by the Supreme Court.

The attraction of both of these ideas, of course, is that they provide a mechanism for resolving conflicts without thoroughgoing

institutional change and while providing at least some percolation. Objections to the former proposal (Justice White's) are that it 1) could invite forum shopping by litigants, 2) might conceivably encourage a circuit to jockey for position so as to be the circuit afforded the opportunity to resolve an issue nationally through an en banc procedure, 3) would compel circuits to resort to costly and unwieldy en banc procedures in order to depart from a ruling of another circuit, and 4) would randomly designate a circuit with arguably less expertise in a particular subject-matter area to make national law in that area. The latter proposal (Coleman's) would minimize concerns (1), (2), and (4) to some extent, although not entirely, in that it would provide for a form of intercircuit en banc panel; no one circuit sitting en banc could make national law. However, the costs and inconvenience of the latter proposal would be greater. Once one decides to resort to an intercircuit panel to resolve these issues, it would seem much less unwieldy to adopt something akin to the Callow proposal than the Coleman idea. Under the Callow proposal, too, a single intercircuit panel, however constituted, would resolve these issues; the composition of each particular intercircuit en banc panel would not be random and serendipitous as under the Coleman proposal.

A 1978 student note in the Yale Law Journal, 87 Yale L.J. 1219, proposed that the first en banc decision of any circuit should have binding national effect; decisions of three-judge panels, under this proposal, would not. Once an en banc panel has

rendered a decision -- even on an issue as to which there is as yet no intercircuit conflict -- no other court of appeals, even if convened en banc, could decline to follow it. The student writer suggests that a subsequent court of appeals unhappy with the precedent could, while following the precedent, state its objections thereto, or else could certify the case to the Supreme Court under 28 U.S.C. § 1254 (2). This proposal has the defect that it could cut off any percolation altogether by allowing the first circuit to consider an issue to bind the nation by going en banc.

3. Supreme Court reference to circuit panels. Estreicher and Sexton, in their massive article at 59 N.Y.U. L.Rev. 681, 807-808 (1984), suggest that rather than create an intercircuit tribunal, the Supreme Court could be authorized to refer conflicts it did not wish to resolve to a randomly chosen circuit court. They argue that "[s]uch a statute might authorize the circuit court to issue a nationally binding resolution reviewable at the discretion of the Supreme Court, thereby freeing up [Supreme Court] docket capacity without sacrificing the benefits of lower court percolation or creating a new tribunal whose only ostensible task would be handling parochial, relatively insignificant cases." Whatever the utilitarian benefits of this idea, I question whether it could gain acceptance among lawyers and judges. Where two or more circuits have disagreed on an issue, it would appear inappropriate and, some might argue, illegitimate to refer the matter for nationally

binding decision to another three-judge panel of coordinate authority. The deciding panel would have no logical claim to primacy over the panels that already had spoken on the question.

This problem would be avoided if the reference were to an en banc panel of a circuit, chosen randomly or by rotation. Judge Clifford Wallace suggests just such an approach in an article at 71 California L. Rev. 913, 935 (1983). But, again, once the step to en banc resolution is taken, it might well be preferable to arrange for decision by an intercircuit panel, as under the Callow proposal.



# Federal Courts Study Committee

22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, PA 19106-1722

Judge Joseph F. Weis, Jr.  
Chairman

Telephone: 215-597-3320  
Facsimile: 215-597-3350

William K. Slate, II  
Director

October 4, 1989

Steven G. Gallagher  
Counsel

J. Vincent Aprile, II  
Judge Jose A. Cabranes  
Chief Justice Keith M. Callow  
Chief Judge Levin H. Campbell  
Edward S.G. Dennis, Jr.  
Senator Charles E. Grassley  
Morris Harrell  
Senator Howell Heflin  
Congressman Robert W. Kastenmeier  
Judge Judith N. Keep  
Professor Rex E. Lee  
Congressman Carlos J. Moorhead  
Diana Gribbon Motz  
Judge Richard A. Posner

TO: Members and Reporters of FCSC  
FROM: Judge Weis

Dear Colleagues:

At our last meeting a consensus emerged favoring the "pour over" inter-circuit panel referred to during the discussion as the "Callow" Plan as an experimental measure to cope with the problem of inter-circuit conflicts.

After reading Judge Keep's recent letter, I thought it would be desirable for the Committee to consider another proposal as an alternative to, or complementary to, the Callow Plan. The chief weakness of a "pour over" plan is that it does not prevent inter-circuit conflicts, but comes into play only after they have occurred and only after the Supreme Court has been required to address the particular issue.

A drastic restructuring of the courts of appeals will be necessary in the near future, but I agree with Judge Campbell that our Committee cannot confine its work to that topic to the exclusion of other pressing problems at this time. Realistically, a plan to resolve inter-circuit conflicts which can be implemented without undue delay must be simple and effective within the existing structure of the courts of appeals.

Some months ago, Judge Campbell mentioned a proposal which had also been advanced by Justice Byron White, and as you may see from the enclosure, by former Chief Justice Walter V. Schaefer of the Illinois Supreme Court, as well as others. Essentially, the proposal is that the first published opinion by a panel of a court of appeals acts as binding precedent for the other courts of appeals, the district courts, and the administrative agencies. That ruling controls unless overruled by any court of appeals sitting in banc, or of course, by a decision of the Supreme Court.

The problem of inter-circuit conflict is one created by the courts themselves and one that they can cure as well. There are three possible ways to implement a C-W-S Plan, two of them by action of the courts:

1. Adoption by each court of appeals of an internal operating procedure, or local rule of court;
2. Adoption of a rule by the Supreme Court in the exercise of its supervisory authority over the inferior federal courts;
3. Legislation.

In his ABA Journal article, Justice Schaefer discusses the desirability of eliminating inter-circuit conflicts and objections to the jurisprudentially questionable practice of deliberately creating differing interpretations of federal law. I need not repeat those arguments here.

Adoption of the Campbell-White-Schaefer proposal would not conflict with the Callow Plan because they come into operation at different stages in the appellate process. However, it is possible that in practice the C-W-S Plan would greatly reduce, if not eliminate, the necessity for a "pour over" type procedure.

I am sorry to impose additional reading upon your already limited time, but I do think the Schaefer article is worthy of your review.

Best regards.

Sincerely,

  
Joseph F. Weis, Jr.

JOINT COURTS STUDY COMMITTEE

22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, PA 19106-1722

Judge Joseph F. Weis, Jr.  
Chairman

Telephone: 215-597-3320  
Facsimile: 215-597-3350

William K. Slate, II  
Director

November 1, 1989

Steven G. Gallagher  
Counsel

FAXED AND MAILED

J. Vincent Aprile, II  
Judge Jose A. Cabranes  
Chief Justice Keith M. Callow  
Chief Judge Levin H. Campbell  
Edward S.G. Dennis, Jr.  
Senator Charles E. Grassley  
Morris Harrell  
Senator Howell Heflin  
Congressman Robert W. Kastenmeier  
Judge Judith N. Keep  
Professor Rex E. Lee  
Congressman Carlos J. Moorhead  
Diana Gribbon Motz  
Judge Richard A. Posner

Honorable Levin H. Campbell  
Chief Judge, United States Court of Appeals  
1618 John W. McCormack Post Office & Courthouse  
Boston, Massachusetts 02109

Dear Lee:

I am sending you the type-written versions of Vincent Aprile's and Rex Lee's proposals that were discussed briefly at the last meeting. I would also like to make a few comments of my own.

I think it is important that we not forget that the Committee is charged with the development of a long-range plan including assessments involving the structure of the court system and methods of resolving inter-circuit and intra-circuit conflicts.

The information that the Committee has already gathered has demonstrated that some restructuring of the Courts of Appeals will be necessary within the next ten years. We have had a number of proposals submitted which vary substantially in the formats which might be adopted. What is lacking is empirical data on what structures would be practical and effective.

One of the key elements in analyzing structural alternatives is intra- and inter-circuit conflicts. Logically, analysis should begin with the question whether deliberate, acknowledged conflicts in decisions by the Courts of Appeals should be considered legitimate in the interpretation of what should be uniform national law. Apart from that issue is the problem of resolving inadvertent or questionable conflicts. Pilot projects could provide needed information on methods of meeting these difficulties.

Both Rex Lee's and Vincent Aprile's suggestions offer the prospect of giving some answers. The Aprile-Keep-Wallace proposal is the simplest and least intrusive form of the "poor over" or "referred down" method of resolving conflicts after they

reach the Supreme Court. It gives added resources to the Supreme Court to meet the burden of resolving conflicts. My question is whether, in looking down the road and viewing the increasing caseloads, it is realistic to expect that even with a "poor over" capacity, the Supreme Court can -- or should -- be saddled with an increasing preoccupation with conflicts created by the Courts of Appeals. Will it not become necessary at some point to resolve conflicts before they reach the Supreme Court -- without, of course, restricting the Supreme Court from granting certiorari on any case whether or not a conflict exists?

Rex Lee's proposal aims to resolve conflicts before they reach the Supreme Court, and a pilot project using that approach could develop valuable data, but I fear the plan does not go far enough. My concern is that it would not give an answer to a critical question that should be considered in future court restructuring. That question is whether it is feasible to create a system of appellate courts based on giving precedential affect to the first panel decision on a nationwide or even a very large regional basis. Such a system would necessarily include some type of in banc review as a corrective measure for an erroneous panel determination, but would not in any way restrict the Supreme Court from granting certiorari at any point it chose.

Although there has been a great deal of debate on the panel precedential concept which we have labeled the "White-Campbell Plan," no one really knows if it is workable. If it is, it will be the key to meeting the mounting caseload of the future. If it does not work, we need to know that so that other alternatives can be explored. The concept is explained lucidly in Chief Justice Walter Schaeffer's article in 69 ABA Journal 452, which I forwarded with my letter of October 4, 1989. I think the article is worth reading.

When there is agreement on some of the details, Judge Cabranes suggested that pilot projects on both general concepts proceed in tandem. There is much to be said for that suggestion because it has promise of more immediate action.

Too often in the past the federal courts have been forced to react to crises without adequate information on what steps would be most effective and desirable. Usually, the solution is additional judgeships without considering the serious consequences of that action. Our Committee has the opportunity to recommend steps to be taken now that will give us data for the future.

Judge Campbell  
November 1, 1989  
Page Three

I believe the Aprile-Keep-Wallace proposal would work today and for the next few years. I am not sure it would be enough for the loads of ten years hence. Similarly, the Lee proposal would be helpful today, but probably would not meet the problems ten years down the road.

Unfortunately, we did not have enough time to discuss the issues at our last meeting, and I would like to hear more from Vince and Rex on the subject. I hope that I am not imposing too much on them by asking them to respond to you to see if we can come to some sort of consensus.

Sincerely,



Joe

cc: Professor Rex Lee  
J. Vincent Aprile, II  
Denis J. Hauptley  
Bill Slate



oct30\leedisc  
11/1/89

Submitted by Rex E. Lee

#### CONFLICT RESOLUTION

Regardless of what we call it, our procedure should have the narrow objective of requiring any given court of appeals to focus on the material consequences of going into conflict with another court of appeals. I believe it should work as follows:

1. The first circuit to decide any issue would decide for that circuit only.
2. Any subsequent circuit to consider that same issue would also decide for that circuit only. It would not bind any other but in deciding whether to ask for an en banc, each court of appeals judge should take into account arguments that the panel decision conflicts with another circuit; that is, that the case decided by the panel would have been decided the other way if, on its same facts, it had come up in another circuit.

The advantages of this approach are:

1. It does not require the creation of any new judicial entity or the exercise by any circuit of powers outside that circuit.
2. It would address the problem at its source. My guess is that if we formalized a



procedure by which all courts of appeals were required to consider the national consequences before going into conflict, the conflicts that still developed could be handled by the Supreme Court. We do not want to eliminate all conflicts. Some should exist and work their way to the Supreme Court.

3. One of our objectives should be to lessen the demand on Supreme Court resources. We may eventually have to go to a "refer down" system, but such a system does consume Supreme Court time and attention. That may be necessary but why not first determine that it is necessary before we require it.

It may be that if we diminish the court of appeals' conflict development, the Supreme Court could, without a "referral down", handle those conflicts that still developed. Thus, the five-member committee to oversee a study and make recommendations is a good idea.

This proposal would not catch every potential conflict, such as those that develop at about the same time, or for some other reason were not known at the court of appeals stage. But it should pick up most, especially because the incentive that Supreme Court litigators now have to identify conflicts when they file certiorari petitions would shift to the court of appeals stage.

## 2. Increase in Numbers of Judges

The Hruska Commission in 1975 expressed great concern over the growth of circuits in excess of nine judges. Commission on Revision of the Federal Court Appellate System, "Structure and Internal Procedure: Recommendations for Change," 57-59 (June 1975). Consistent with this philosophy, it urged the division of the Fifth and Ninth Circuits. The Fifth was divided in 1981. The Ninth successfully resisted change, and today operates with 28 authorized judgeships. Ironically, only a few years later, both the Fifth and the Eleventh (which was created from the Fifth), now have caseloads that could soon bring them to 20 or more judges. The Sixth faces a like situation, followed by the Third and Fourth. The number of appellate judgeships has risen nationally from 59 judges in 1945 to 156 in 1988, a three-fold increase. The average size of a circuit court of appeals has risen from five judges in 1945 to 12.5 judges in 1988. As of today, the circuits authorized judgeships are as follows: D.C. — 12; First — 6; Second — 13; Third — 12; Fourth — 11; Fifth — 16; Sixth — 15; Seventh — 11; Eighth — 10; Ninth — 28; Tenth — 10; Eleventh — 12. Applying the 85-terminations formula now in use by the Judicial Conference of the United States to determine new judgeships needs, *supra*, the circuit courts would theoretically need 49 additional judges to handle their 1988 caseload, or a total of 205 judges. If this number of judges were, in fact, realized, the "average" court of

appeals today would have 17 judges.<sup>2</sup>

Our Subcommittee has secured alternate projections, based on caseload, of future judgeship needs utilizing the 85-terminations formula. Assuming appellate caseload rises in the next five years at the same rate as it has from 1960-89 (the most conservative of several projections), a total of 280 judges would be required in 1994. This would raise the per circuit average to 23 judges. (Three circuits would have over 30 judges, and one, the Ninth, would have 43.) This same projection would predict a need for 315 appellate judges in 1999 (26 per circuit, with the Fifth at 39 and the Ninth at 49), and 392 judges by 2009 (33 per circuit, with the Fifth at 49 and the Ninth at 61 judges). If the future judgeship increase is projected on the basis of trends from 1970-89, a larger increase occurs: 288 judges are needed by 1994; 332

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<sup>2</sup>Broken down, the new judges under that standard, based on 1988 statistics, would be as follows: D.C. Circuit — 0; First — 2; Second — 0; Third — 5; Fourth — 8, Fifth — 8, Sixth — 9; Seventh — 1; Eighth — 2; Ninth — 2; Tenth — 3; Eleventh — 10.

These numbers are much greater than the 16 judgeships requested by the Judicial Conference in its pending judgeship bill (revised to include the Sixth Circuit's recent request). The number in that bill is derived from lower 1987 statistics. Besides considering the 85-terminations formula, the Conference, in drawing up that bill, reviewed other factors affecting the circuits, including the views of the judges. A Conference committee is now in process of drawing up judgeship needs based on 1989 statistics. We note that the judges of the heavily burdened Eleventh Circuit declined to request any new judgeships pending the report of this Committee. The Sixth, on the other hand, after initially voting not to request additional judges, reversed its position in 1989. Other circuits requested fewer judges than the 85-terminations rule would allow. The circuits' reluctance to request new judgeships reflects a resistance to growing larger. It could also reflect genuine weaknesses in the 85-terminations formula, where caseload growth may reflect case types not requiring as much judge-time.

by 1999; 423 by 2009. Under this projection, the average circuit should have 24 judges within five years; 28 within ten years, and 35 within 20 years. The Sixth would reach 46 judges within 20 years, and the Ninth 67.

The burgeoning caseload has thus caused a sharp increase in the needed number of circuit judges. Many of the circuits could reach 20 or more judges within a few years.

An initial question is whether to adopt the Hruska Commission's goal to keep each circuit's size to nine judges or thereabouts. We think it would be premature to adopt such a goal now, although we think that within a few years a decision will be required. There are several reasons for postponing any immediate response.

First, caseload growth has been so great to date that any decision to aim for a permanent system of small circuits would involve dividing and reorganizing not only the Ninth but the Third, Fourth, Fifth, Sixth and Eleventh. Indeed, it is difficult to see how the circuits could be reduced simply by dividing the present circuits. Rather it is more likely the present circuits would have to be scrapped, and a completely new set of circuits devised, probably with some built in mechanism for periodically reorganizing them so as to maintain the number of judges in any one circuit below the maximum established. There is no constitutional reason not to do this — the lower federal courts have been thoroughly reorganized several times during our history. On the other hand, the effort and disruption involved would be enormous. A

fundamental change like this should only be recommended if it is clearly the right step. Yet for the reasons stated below, we need to know more before we can say that the creation of twenty or more smaller circuits is the most desirable future course.

Second, the creation of a system of small circuits is only workable if a mechanism can be devised to handle the problem of intercircuit conflicts. As pointed out in the next section, the growth in appeals has created more and more instances where different circuits rule differently as to the meaning of federal law. Moving from thirteen to twenty or more circuits can only exacerbate the problem. As we discuss in the next section, it is necessary to learn more about the relative seriousness of this problem and, specifically, what cases are most troublesome, and their numbers, if we are to deal with it. There is more to be learned, in addition, about mechanisms to cope with it. Thus we recommend in Section 3, below that a limited intercircuit panel be tried out as a four-year pilot project overseen by the Supreme Court, along with an intensive study of the problem. If our recommendations are followed, the requirements of a twenty circuit system will be far better understood than now. It could be that with the knowledge and techniques learned it will turn out to be possible to develop a workable appellate judiciary subdivided into a multitude of small circuits, using intercircuit panels and various national stare decisis rules to resolve conflicts. On the other hand, it may turn out, as some people fear, that twenty or more circuits are not desirable or are only manageable if made into



the lower tier of a two-tier federal appellate court, the upper tier of which might be four or five higher tribunals, each of which would have discretionary appellate jurisdiction over four or five of the circuits. This upper tier would thus be inserted between the circuits and the Supreme Court. Such a multi-level plan, while it might have more merit than some would concede, is obviously not a commitment lightly to be entered into. In other words, whether to create many small circuits is a question that should be postponed until it is possible to know more plainly what such a step might entail.

Third, the ability of the Ninth Circuit to manage with 28 judges also gives us pause, since it is possible that a large circuit is more feasible than once believed. Viewing the Ninth Circuit as an experiment in the management of a "jumbo" circuit, we think it worth letting more time go by before determining finally whether larger circuits are, indeed, unworkable. The Ninth insists that it is managing well.<sup>3</sup> Many of its judges agree.

We recognize that a large majority of judges outside the Ninth (and some within) disagree with the proposition that bigger is better. Three quarters of the circuit judges who responded to the Committee's poll indicated that, in their view, 15 or fewer judges was the outer limit of a properly and effectively functioning circuit court of appeals. Many put 12 or even nine as

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<sup>3</sup>See Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1978, submitted by The Judicial Council and The United States Court of Appeals for the Ninth Circuit (July 1989).



the outer limit.

The debate between the Ninth and the small circuits is a contest between two very different concepts of a circuit court. The Ninth is essentially a rotating system of three-judge panels (over 3,000 combinations are possible) covering an enormous geographic area and bonded by a very capable administration and the nation's only small (11 person) en banc. (Its willingness to accept a small en banc, a mechanism recommended by the Hruska Commission, may be a key to its ability to operate, since the virtual impossibility of large court en banc procedures was one of the reasons the old Fifth agreed to split.) The other circuits still prefer the traditional concept of a small, unitary circuit court even as their growth increasingly belies that image. Such a court has been characterized by intimacy between the judges and projects the powerful personalities of its regular members. The Ninth has either found a workable alternative to the traditional model, or else the entire appellate system as it now exists must shortly be restructured, since other circuits are soon destined for "jumbo" status (unless some method of controlling caseload is adopted). Professor Arthur Hellman, who has just studied in detail the question of intra-circuit conflicts in the Ninth Circuit, reports after studying a quantity of Ninth Circuit decisions that the panels of that circuit have been faithful to stare decisis, and that the en banc has acted effectively when required. He concludes

that the Ninth is not at all torn by intra-circuit conflicts.<sup>4</sup> The Ninth itself insists, in its latest report, that it should be regarded as the harbinger of future circuit courts rather than as anything abnormal.

We believe that more study is needed, as well as more opportunity for debate among bench and bar, before this issue can appropriately be resolved. The experience of the Ninth shows that, with good leadership, a large circuit can at least keep current and do its job. This encourages us to believe that, at least, for the next five years, the present system is capable of absorbing the caseload, and taking on such additional judges as Congress provides, while further thought is being given to a future course of action.

We do not mean to suggest that our Subcommittee views the only options to be small versus large circuits. The Subcommittee has studied the following alternatives:

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<sup>4</sup>One piece of data contrary to Professor Hellman's report is found in the answers by Ninth Circuit district judges and attorneys to a survey published in July 1987. Asked if they agreed with the statement "There is consistency between panels considering the same issue," 59 percent of attorneys and 68 percent of district judges disagreed. Many respondents felt strongly that there was not consistency. Professor Hellman acknowledged a degree of inconsistency in those Ninth Circuit cases where the governing legal rule permitted a court to apply a variety of judgmental factors, of a type that could vary person-to-person. Since his study did not attempt to compare the Ninth with smaller circuits — which presumably might also reflect different judgment calls in such matters — it is difficult to assess whether the Ninth differs in this respect from other circuits. As the Supreme Court itself indicates, small size does not guarantee uniformity of view.

1. Adoption of a certiorari system, permitting each circuit to control the number of cases it reviews (i.e. abolish appeals of right in some or all types of cases).

2. Abolishing the present circuits, and replacement with one of several new structures.

3. Retention of the present system, with, perhaps, study of further innovations to make the "jumbo" circuits of the future more manageable.

The Subcommittee has looked into all these possibilities with as much care as its short timetable allows. It has read the literature, diagramed and even invented various new structures and considered some of the pro's and con's. Alternatives 1 and 2 would require fundamental changes in the judicial system. The choices are difficult and we see few benefits in attempting to select one specific change now rather than inviting further consideration of the entire matter during the next few years.<sup>5</sup> For reasons already discussed, more time will assist in assembling needed information. In addition, it could be that other proposals of this Committee will result in a reduction in appellate caseload thus relieving some of the pressures for change or at least tipping the scales

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<sup>5</sup>We accordingly take no position on the question of splitting the Ninth Circuit. As an isolated question, that involves issues peculiar to the region which we are not qualified, in the time and with the resources we have been given, to address. Insofar as the question turns on whether, as a general principle we disfavor circuits of that size, we think an answer would be premature, since it would require us to determine now whether a major reorganization touching upon all or most of the circuits in the nation is desirable. As noted above, that is an extremely difficult puzzle, the pieces to which are not yet all available.

toward a different alternative. Less likely, but still perhaps possible, fundamental changes in society or in the economy would bring about such a reduction. And, finally, we believe that it is desirable to bring members of the bench and bar more fully into the discussion. The federal courts of appeals are, in a sense, victims of their own success. They have kept efficient and current. Few outsiders, even now, see signs of a problem. The pressures in circuits like the Third, the Fourth, the Fifth, the Sixth, and the Eleventh are just now being strongly felt by their judges; and if the caseload numbers persist in going up, as seems likely, it will surely be apparent before long that many circuits must either be operated at "jumbo" size, or else a whole new approach or structure must be adopted. We strongly urge that in the time remaining — which we estimate as within the next five years — that the Congress, the courts, bar groups and academia give serious thought to the problem and to the alternatives.

In the remaining part of this section we shall discuss the parameters of the available alternatives, as we see them. By describing them briefly, and by including in our Appendix (now consisting of our blue binder) some of the materials developed with respect to each, we hope to help orient the readers as to what, after consideration, we believe to be the practical alternatives. It is among these options that choices will have to be made within a relatively short time.

A. Should a system of circuit court certiorari be adopted?

A simple way to control the rising appellate workload would be to give to each of the courts of appeals the option now possessed by the Supreme Court to control its own docket. The Supreme Court, with a fixed number of justices, hears about 150-160 cases a year. This number does not change, even though the number of petitions for certiorari may and does change. By using the same method, courts of appeals could tailor to their own resources the number of appeals taken under advisement. The courts of appeals would develop rules and a screening procedure which would enable each of them to decide what cases to hear and what to reject. Whether to include criminal cases in the process would have to be addressed. Conceivably the screening procedure could include a requirement that all appellants first seek the district court's approval to appeal — much like the certificate of probable cause required in habeas cases. While the court of appeals could still grant review if the district court declined approval, the view of the lower court might be a helpful factor, since, having lived with the case, the trial judges will know whether it is clear or close.

To study discretionary review, the Subcommittee requested Kathy Lanza, Esquire, to prepare a paper which is included in the Appendix. This paper includes a survey of the approaches taken in the three states having discretionary review — Virginia, West Virginia and New Hampshire. It also considers



the experience of the United States Court of Military Appeals, and refers to the principal literature. We refer any interested reader to this paper.

The argument against discretionary review is that it must be somewhat pains-taking unless it is to do violence to the tradition of appellate error correction. Lower appellate courts, unlike the Supreme Court, obviously cannot assume that ordinary errors have already been corrected. Granting or denying certiorari cannot, therefore, turn simply on identifying the presence of an important precedential issue. To determine if error could have occurred below, an appellate court will have to conduct a fairly comprehensive examination, aided by briefs and by the trial record. The amount of time spent in this searching kind of inquiry may be just as great as the efforts a circuit court makes today in identifying cases for possible summary disposition. In other words, a careful certiorari procedure might save little if any of the time now spent. Moreover, there would be the danger of spending time twice — first to consider whether to allow review, and later, if review is allowed, to decide the case.

On the other side, a certiorari procedure can be tailored almost infinitely to the needs of the system. If the caseload were overwhelming, the grant or denial of certiorari could be turned into a less sensitive process. The judges would not be obliged, as they are when handling a true appeal, to satisfy their consciences that they approve or disapprove of a particular outcome. "Certiorari denied" could simply mean: "We don't have



room, and your case seems less troublesome than others."

Conceivably certiorari could be combined with procedures such as truncated review of a colleague's case by one or two trial judges, as a condition for seeking certiorari. The difficulty with such a procedure would, again, be that the administrative costs, and judge-time, could well be greater than the fast-track time presently spent by a circuit court on many of its cases.

One thing is clear. While the Supreme Court has never held that an appeal is constitutionally required, the federal system and virtually all state systems now provide one appeal as of right to all litigants. Alteration of that tradition, even if in the civil area alone, would be a major change in our philosophy. It might conceivably become a needed step if the costs of providing an appeal in each case become too high. But the screening and tracking techniques now used by appellate courts may be adequate. The Subcommittee sees adoption of certiorari review as an action of last resort, and does not now recommend it. It should, however, be studied because it is an obvious alternative to building a costly, more elaborate appellate structure should caseload pressures prove intractable.

#### B. Alternative Circuit Structures

The Subcommittee has spent considerable time studying, developing and diagraming a variety of alternate structures to the present circuit system.

The current system was established by the Evarts Act

in 1891. As we have already said, it need not be regarded as engraved in stone, although many people tend to see it as such. The day has already come (except, perhaps, in the First Circuit, which has six judges), when the traditional small circuit court that characterized the first 70 years of the system has been irrevocably lost. Circuit courts operating with even 13, 14 or 15 judges cannot hope to be the small, unified collegial bodies of yesteryear. A court like the Ninth Circuit, with 28 judges, is an entirely different institution.

It can be argued that when an institution that has served well has been changed beyond recognition, it should be abandoned. Certainly no one would institute from scratch a federal system with circuits ranging, as now, from six to 28 judges and reflecting, geographically, even greater discrepancies in circuit sizes. On the other hand, the present circuits are functioning; the judges and administrators have adapted to the peculiarities of each circuit; and it is quite possible that the trade-offs between having twenty or more smaller circuits or having the "jumbo" Ninth circuit, and the soon to be "jumbo" other circuits, militate against change. About all that can be said is that no system, whether the present one or any of the alternatives we have considered, can recapture the past. All must reflect the enormous growth in caseload and the many more judges that the modern era demands.

We are presenting as an Appendix to this subpart a binder reflecting the structural alternatives we have discussed.

There are essentially four types of structures (besides keeping the present format) of particular interest, although each type has many possible variations, and it is possible, also, to meld types.

Type I. To achieve small circuits the present circuits would be eliminated and entirely new circuits drawn, limited to nine, twelve or fifteen judges each. Problems of geography might be troublesome; states might have to be split. To cope with future caseload growth such as overtook the Eleventh and Fifth Circuits only a few years after their division, it would make sense to provide a mechanism for examining and, if needed, redrawing circuit boundaries every decade or so, in order to maintain a proper size. The central problem, as already stated, comes in respect to controlling the increase in intercircuit conflicts that a larger aggregation of circuits would surely create. Numerous ways of doing this have been suggested.

One method would be to require each circuit to adhere to the precedent of others, except where the Supreme Court has spoken. However, this rule of national stare decisis would have to be ameliorated by an opportunity to break away from the decisions of other panels believed to be clearly erroneous. One proposed method would be to create intercircuit review panels of some type which would have the power to resolve conflicts finally (subject to Supreme Court review). Another would be to grant nationally binding status, in certain circumstances, to the opinion of en banc panel of a particular circuit. The important point about arrangements of this type, would be that judges from the circuits

would themselves be utilized, in some formalized manner, to issue pronouncements binding on colleagues beyond their own circuits. Intercircuit conflicts could thus "be cut off at the pass," without total reliance on the Supreme Court as the sole arbiter. There would, however, be no "second tier" or other formal court structure between the circuits and the Supreme Court.

Another quite different structure for policing the intercircuit conflicts that multiple small circuits will create would be to integrate the circuits into a fully developed two-tier appellate court system. The twenty or so circuits would become the bottom tier. The upper tier would consist, nationally, of four or five "higher" tribunals, consisting of perhaps seven judges each. Each new court would have its own geographical area comprising four or five of the circuits from which it would hear appeals on a discretionary basis. A possible advantage of the above system would be to channel the major law-declaring function below the Supreme Court to a few major tribunals. This would displace the voluminous and perhaps increasingly disparate case law that 200 or 300 co-equal circuit judges, governed only by a distant Supreme Court, can be expected to produce. The lower tier circuit judges would still do important work, especially in the area of error correction. But the relationship between the two tiers would be somewhat like that in states today between the state's highest court and the intermediate appellate courts. This analogy is imperfect, of course, in that the Supreme Court would remain head of the federal courts. Still, with Supreme Court review relatively

rare, the new upper tier would have an important supplementary role. This system could absorb the many more judges that will soon be needed, while preserving coherence.

Type II. ANother alternative is to create national subject-matter courts so as to relieve the regional circuits of much of their current caseload. The national exponent of subject-matter appellate courts is Professor Daniel Meador, an advisor to the Subcommittee. Professor Meador is chairman of the American Bar Standing Committee on Federal Judicial Improvements which, in March of 1989, issued its report entitled "The United States Courts of Appeals: Reexamining Structure and Process after a Century of Growth." In this report, the majority recommends what it calls "non-regional appellate courts defined by subject matter," principally a national court of tax appeals and a national court or courts to hear some administrative appeals. Subject matter panels in the regional circuits are also recommended. A significant advantage of subject matter courts of appeals is that they eliminate intercircuit conflicts, provided all appeals of that type can be handled by one upper-level subject-matter court.

Professor Meador has explained his own views more recently in an article entitled "A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Court of Appeals," 56 Un. Ch. Law Rev., No. 2, 603 (Spring 1989). While many bar leaders and judges oppose what they call "specialist courts", Professor Meador points out that his concept is not limited to specialized courts but includes courts like the Federal

Circuit and, in some areas, the D.C. Circuit, which are composed of generalist judges whose jurisdiction is defined, at least sometimes, by the subject matter of the cases. The existence of these and certain Article I courts indicate that subject matter courts already have a recognized place among the country's judicial institutions.

However, the Subcommittee has difficulty seeing subject matter tribunals as providing major relief for the present circuits. If the elements of the ABA standing committee report were adopted, they would affect only a small portion of the caseload. And a wider creation of subject matter courts would, in our view, raise numerous political and organizational issues. The concept is nonetheless worthy of continuing research and study, especially as there are undoubtedly types of cases best handled by subject matter tribunals. For example, an Article I tribunal to handle all entitlement appeals such as Social Security, Veterans' benefits, and the like seem well worth considering. Whether an executive agency exists to receive such a tribunal is unclear (perhaps OMB?)

Professor Meador has drawn up an interesting amalgam of the two-tier regional system mentioned under Type I with a group of subject matter courts (see Appendix).

Type III. Efforts have been made to create models of a single national appellate court, i.e. one lacking in circuits or other sorts of separate regional entities. Professor Carrington's interesting description of one such model is contained



in the Appendix, along with a diagram our Subcommittee has prepared. The Subcommittee's initial reaction was to fear that a single, nationwide structure would have the faults of a large bureaucratic agency. Whatever their weaknesses, the federal circuits have responded with considerable initiative to the demands of the last 20 years. It may be that this initiative stemmed in part from the feeling of judges, clerks and administrators in particular locales that the challenge was their challenge requiring their response. Had they been part of a nationwide bureaucratic structure, the commitment might have been less. The modern trend in the federal courts, which we approve, has been towards decentralized administration.

There are however, advantages to a nationwide entity, one of which is the ability to divert judges and resources to places of particular need. Another would be the control of intercircuit conflicts. A feature of Professor Carrington's model is to distinguish between panels handling routine, fact-specific disputes and those handling cases where law-declaring would be required. Only in the latter would there be written opinions. The model also relies extensively on subject matter panels.

#### Type IV.

It has been suggested that the circuits should be reduced to several "jumbo" circuits. It is argued that this would curtail intercircuit conflicts, and that the larger circuits could more easily shift resources within their borders. Such a system might call for the creation of intra-circuit divisions; would

require small en bancs to function effectively; and might require further innovations — such as strengthening the en banc so as to transform it into something closer to a supervisory court within a court. If the nation were divided between, say five "jumbo" circuits, the structures created within each circuit might have the effect of creating, nationwide, something like the two-tier regional system described under Type I.

We doubt that a move to merge smaller circuits would command widespread support. We mention it only because it highlights some of the possible, as yet unrealized, advantages of the large circuit.

There are endless variants on the above four types: we think that they, however, suggest in a general way the concepts that are available. In Section 3, infra, in discussing the control of intercircuit conflicts, we refer to another type of arrangement aimed specifically at resolving conflicts in the current system.

#### C. Keeping the Present Circuit System

As we have said, it is hard to imagine setting up the present circuits from scratch today. Not only are their sizes and territories quixotic, their increasingly large courts, sitting in shifting panels of three, bear little resemblance to the unitary courts that once answered to the names of the Ninth or the Sixth Circuits. Yet there is comfort to be found within a familiar structure. The circuits have so far done extremely well in meeting the growing caseload; and they have all coped with the steady increase in judges. It may be that, as the Ninth Circuit has

found, there are a variety of viable ways to deal with "jumboism."

We have no doubt that the larger circuits will have to adopt a small en banc, as has the Ninth.

They may also wish to create divisions, and experiment with the concept — not adopted by the Ninth — of having judges rotate within a particular division. They may also wish to consider developing a system for regularly assigned staff to notify judges of perceived intra-circuit conflicts. These and other innovations may eventually make it possible for the present circuits to adapt to the large caseload and numbers of judges.

#### Conclusion

Within probably five years it should be decided whether to keep the present circuits or whether to create some new structure. During the five year period, the circuits can continue effectively and should not hesitate to seek such additional judgeships as are needed. Also during this period, we hope that a study and pilot project, as proposed in the next section of this report, will be undertaken. This study and pilot project will lead to a greater understanding of the nature and extent of the intercircuit conflicts problem, and of mechanisms, supplementing Supreme Court review, to resolve conflicts. Armed with the knowledge, and with further experience with larger circuits, a choice can then be better made whether to keep the present structure, or create some other.

### 3. The Rise in Intercircuit Conflicts

In the previous section, we discussed one of the distortions that caseload increase causes in the circuit system established under the Evarts Act: namely, the increase beyond nine or ten in the number of judges in a circuit. Since a court beyond that size does not function in a circuit like the traditional unitary appellate court, some observers feel the Evarts Act system is now "outgrown" — that a new "structure" is needed. Like a lobster whose shell has been outgrown, the courts are said to need a new skeleton. As we have seen, however, there are relatively few new skeletons to choose from, and each has its own problems which must be weighed against the problems that exist if we try to make do with the present system.

If, for example, we were to restructure the present circuits to a maximum of nine judges in each, the resulting proliferation of circuits would exacerbate the problem to be addressed in this section, namely, the increasing inability of the Supreme Court, in the face of the growth in appeals, to resolve conflicts among the lower courts.

In the first half of the 1900's the Supreme Court could easily manage its role of fashioning a single national law for the entire nation. In the early quarter of this century, about six percent of all federal appeals eventually reached it. As recently as 1950, the Court reviewed close to three per of federal appeals. That proportion has by now dropped to less than .4 percent, and will keep diminishing as the total number of appeals rise. The

Supreme Court's annual caseload is in the neighborhood of 150 cases. This has remained roughly constant for sometime, and there is little prospect of a major change upwards. While a few commentators have suggested the Supreme Court could increase its own output if it wanted, we doubt that this is so, given the difficulty of the cases that the Court hears. It is hard to imagine the Court splitting into three-judge panels, as some have urged, given the sensitivity of so many of its cases; and even if it did split into smaller panels, the increased opinion-writing burden this would place on the justices would quickly limit the gain in productivity. In any case, the Court alone can best gauge its capacity; and this, as said, has been approximately 150 cases for some years, of which approximately \_\_\_\_\_ percent come from the federal courts of appeals.

The relative capacity of the Supreme Court vis-a-vis the circuits is highly important because, under the system devised by the Evarts Act, the Supreme Court is our only national court of general jurisdiction. Sitting at the apex of the federal and state systems, one of its function is to harmonize the federal law coming from both types of courts, including from the regional circuits.<sup>6</sup> Yet it is obvious that a court which hears less than .4 percent of all federal appeals is less able today to perform this harmonizing

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<sup>6</sup>As Professor Meador writes,  
". . . [T]he Supreme Court remains the only institutional means through which this vastly increased outpouring of decisions can be harmonized and made uniform throughout the nation." 56 Un. of Ch. L. Rev. 604 (1989).



function than it once was when it heard three percent or more.

The Supreme Court has long since given up granting certiorari in all cases of intercircuit conflicts. As a result there are many instances where a Congressional statute means one thing in one area of the country and something different elsewhere.

The relative importance of unresolved intercircuit conflicts is a question that has been debated up to this moment. The Hruska Commission, in 1975, urged the creation of a new National Court of Appeals, intermediate between the Supreme Court and the circuits, in part because of the perceived need for greater capacity to resolve intercircuit conflicts. Under the Hruska Commission's plan, the Supreme Court would refer 150 cases a year "down" to the new tribunal, thus doubling the capacity at the top of the system to determine federal law on a nationwide basis.

The recommended new court was never adopted by Congress, and subsequent proposals for a similar body, including one manned by existing circuit judges, have been unsuccessful. Meanwhile, one of the reasons for such a tribunal — the need to relieve the burden upon the justices of the Supreme Court — has largely disappeared now that the Court has discretionary control over its own docket. Intercircuit conflicts remain an issue, however.

The difficulty in assessing the extent and seriousness of intercircuit conflicts stems from the absence of comprehensive data. Some very valuable work has been done, but to make a full study (which we believe must be done) requires resources beyond those of an individual scholar. The Subcommittee has a paper by



Jeffrey Barr (see Appendix) that synthesizes the literature and research to date. Extrapolating from findings by several researchers, he estimates, very roughly, that there were 60 to 80 unresolved intercircuit conflicts, of the sort that commentators deemed "direct," presented to the Supreme Court by petitions for certiorari in 1988. This number omits less direct conflicts or "sideswipes" (e.g. a fundamentally inconsistent approach to an issue by circuits).

Barr goes on to emphasize, however, that the bare numbers tell only a part of the story. He makes the point, that, "One can only gauge the need for federal court restructuring to deal with this problem by scrutinizing the conflicts and deciding which are important or 'intolerable' and which are not." Drawing upon work done by others, Barr identifies several factors as relevant to determining which conflicts are "intolerable" and which are not. Among these are the following:

(1) Whether a split in the law creates economic costs or other harm to multi-circuit actors, such as firms engaged in interstate commerce. Some congressional enactments, more than others, demand a uniform national interpretation. For example, Michael Sturley, in an article in 67 Texas L. Rev. 1251 (1989), analyzed the effect of conflicts in the interpretation of the Carriage of Goods by Sea Act ("COGSA"), under which national uniformity is essential so that commercial maritime shippers will know who must insure against which risks and at what costs. Professor Sturley found that the Supreme Court had been more

willing to resolve conflicts under the Longshoremen and Harbor Worker's Compensation Act ("LHWCA") — a statute as to which Congress did not regard national uniformity as so important — than under COGSA, where conflicts are so harmful that any resolution (even the wrong one) may be better than none. Significantly, two organizations that have urged the Federal Courts Study Committee to address the problem of intercourt conflicts represent firms engaged in interstate business activities. The Maritime Law Association has identified eight intercourt conflicts which, until resolved, will adversely affect the clients of its members, who engage in maritime commerce. The International Association of Defense Counsel, representing Members of the (civil) defense bar, complain that "intercourt court rivalry is [a problem] which touches all of us representing clients who engage in business in many states." An interstate business regulated under federal law is likely to be adversely affected by non-uniform construction of the law. In many instances, the particular law may not be of such apparent importance as to interest the Supreme Court; yet the economic effects of leaving the conflicts unresolved may be quite harmful. Problems of this nature are not always evident to a judge or to a trial lawyer — the adverse consequences appear in the planning and execution of business transactions, or in their avoidance.

(2) The need to prevent forum shopping. Conflicts may encourage forum shopping, especially since venue is frequently available to litigants around the nation.

(3) Fairness to litigants in different circuits. Certain laws may seem especially unfair if interpreted differently in different circuits, resulting in benefits to persons in one circuit that are denied in another.

(4) The need to avoid problems of non-acquiescence by federal administrative agencies. When circuits conflict in administrative agency cases, the agency is forced to choose between the uniform administration of its statutory scheme and obedience to the different dicta of the two courts in different regions. While the Solicitor General is usually able to obtain review of a particularly serious issue of this type, it may sometimes be more politic for him to let an agency live with and "work around" smaller issues of this nature. Even if the agency can do this, it may be costly for it to do so and may lead the agency, in some situations, to disregard the dictas of a federal court in similar cases, an approach which breeds disrespect for the law.

*See Dean 4*  
*on Issue of Religion against the United States Government 70 Supr. Ct. 113, 128 n. 114 (1954)*

We list the above factors because we agree with Barr that some conflicts are more in need of rapid resolution than others. In theory, of course, all federal law should be uniform. But the Balkanization of the federal law in circumstances such as those described above is particularly harmful. By the same token, there are doubtless many procedural rules, and laws affecting actors in only one circuit at a time, where the effect of a conflict among the circuits is negligible. We realize that some commentators are of the view that, while harmful conflicts can and do exist, they are not so frequent that the Supreme Court cannot handle them.

Barr's study suggests, to the contrary, that the problem is a larger one. Certainly the numbers he suggests — 60 to 80 unresolved direct conflicts in 1988 — gives pause. We are also concerned by the complaints of the Maritime Law Association, which identifies eight unresolved conflicts of concern to its members, and of the Defense Lawyers Association. Finally, the sheer contrast between today's mounting numbers of appeals and the size of the Supreme Court's tiny, stable docket, suggests that all conflicts of any significance cannot reach the Supreme Court. It may be that conflicts in high profile areas reach the Court, but surely our legal institutions should be able, within a reasonable time, to provide a single, nationwide rule of interpretation for any federal statute where national uniformity is desirable.

We believe that several matters need to be determined as soon as possible:

1. The extent that there are unresolved conflicts of the "intolerable" sort which, because arising in specialized or other "low profile" areas cannot readily obtain access to the Supreme Court.

2. The number of such conflicts.

3. If such conflicts exist to a significant degree, whether statutory or rule changes in the federal system might not provide a means to resolve them. For example, a rule might be adopted that after two, or perhaps three circuits reach a similar result, that this result be binding in all circuits. Another suggested rule would be that if, after one circuit had spoke,

another circuit wanted to take a different position, it could do so only by en banc determination, which (however it turned out) would then bind all circuits in the matter.

4. Chief Justice Callow, a member of the Federal Courts Study Committee, has suggested a mechanism to deal with intercircuit conflicts. This plan calls for a majority of the Supreme Court to refer "down" to an intercircuit panel up to 20 cases a year involving intercircuit conflicts. The intercircuit panel would be made up of thirteen judges, one from each circuit, chosen in some entirely neutral manner, such as by lot, seniority or in some like manner that avoided any possible issue of selecting the judge because of his particular orientation. By limiting the panel's responsibilities to 20 cases, the judges would not be taken away, unduly, from their circuit duties. They would sit for only one term.

~~Looking at the above matters, we see that all four can be brought together as follows:~~

~~1. Congress could be asked to enact legislation providing for establishment of an intercircuit panel as described in (4) above, on a four-year pilot basis. The enabling statute would authorize the Supreme Court to refer up to 20 conflict cases a year to the panel; the panel's decision would be nationally binding unless changed by the Supreme Court itself.~~

~~2. In the same enabling legislation, Congress would empower the Chief Justice to appoint a committee consisting of himself, two justices of the Supreme court and two members of the~~



courts of appeals, to oversee a study by the staff of the Federal Judicial Center. This study would be carried on simultaneously with the activities of the intercourt panel during the four-year pilot program. Information would be kept and analyzed as to all petitions for certiorari, both those granted and those denied, in intercourt conflict cases. Further data and analysis, as authorized by the oversight committee, would be developed concerning intercourt conflicts and the means to deal with them. Emphasis would be on fashioning a mechanism within the existing court structures rather than creating a new court. The committee would then issue a report outlining its views as to the nature and extent of the problem and the best means for handling it.

*Summit (A)* We believe that a pilot study as above described would constitute *be a substantial* ~~an enormous~~ advance on any other approach. If a study of conflicts were alone held, the results might be no more than to add additional data to the pile of scholarly debate materials.

By having justices and judges wrestle with the real-life problem, the realities would quickly emerge and shape the solutions. The ~~Supreme Court~~ *committee* and others would soon discover to what extent and in what numbers there were "intolerable" conflicts of an "intermediate" sort i.e. suitable for court of appeals panel resolution but not of such importance as would normally have induced Supreme Court review. Since it is the Supreme Court's responsibility to harmonize national law, this is ~~an entirely~~ appropriate project ~~to concern it.~~ *would be of great interest to it as well as to the Courts of appeals and the bar*

In addition to engaging the ~~Supreme Court's~~ interest and

*the concern of members of the Supreme Court*





National Court of Appeals to which the Supreme Court might refer the overload of deserving cases, that the Supreme Court is unable to take on. The decisions of the National Court of Appeals would be subject to review and certiorari, but as Justice White stated, "that is no more than what would be necessary to ensure that the federal law is not being enforced in substantially different ways in different parts of the country." He also referred to "another interesting suggestion to minimize the occurrence of conflicting decisions among the courts of appeals, that is to require a court of appeals to go *en banc* before differing with another court of appeals and to make the first *en banc* decision the nationwide rule. I have even heard it argued that this would not

require legislation and could be done by rule."

These statements encourage me to write about the breakdown in the uniformity of federal law throughout the United States. The imperative need for a uniform body of national law underlies the judicial article of the Constitution. As Hamilton pointed out in *The Federalist*, No. 80, "The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." And in the landmark case of *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816),

Justice Story spoke of the "importance, and even necessity of uniformity of decisions throughout the whole United States upon all subjects within the purview of the Constitution."

"Judges of equal learning and integrity, in different states," he continued, "might differently interpret the statute or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the Constitution of the United States would be different in different states, and might, perhaps, never receive the same construction, obligation or efficacy in any two States. The possible mischief that might attend such a state of things would be truly deplorable."

Now the threat to uniformity of national law comes not from the state courts but from the federal courts of appeals. The creation in 1982 of the new Court of Appeals for the Federal Circuit should eliminate one of the prolific sources of conflict. All patent cases will be reviewable in that court and the unseemly, indeed, the absurd spectacle of courts of appeals opinions in which the identical patent was held valid in one circuit but invalid in others will be eliminated for the future. Forum shopping, a staple stock in trade of the patent bar, will be largely eliminated.

The possibility of conflicting rulings in cases involving federal taxes, however, probably has been enhanced by the division of the former Fifth Circuit into the new Fifth and 11th circuits. The proliferation of courts of appeals means inevitably, in the absence of remedial action, a proliferation of conflicts.

#### The spurious "law of the circuit"

The deliberate disregard of the decisions of co-ordinate United States courts of appeals has become so common that it has achieved a dubious respectability under the euphemistic phrase "the law of the circuit." That phrase, I suppose, derives from the phrase "laws of the several states" in Section 34 of the Judiciary Act of 1789, which provided that "the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States." I have not pursued the penul-

ogy of the phrase, because whatever it is, the legitimacy of its present usage is highly suspect. There is no element of sovereignty in a federal judicial circuit.

I have never seen an answer to the searching questions raised by the late Judge Harold Leventhal of the Court of Appeals for the District of Columbia Circuit: "Is there a principled justification for a system where an applicant receives H.E.W. reconsideration depending on his or her residence? Or where the scope of ability to contest a search as unconstitutional depends on the state and circuit of litigation? Or where taxability of a corporation's transfer will vary among stockholders, depending on where the stockholder lives and litigates?"

Justification for contradictory interpretations of national law from one circuit to another is sometimes sought in Justice Frankfurter's aphorism: "Wise adjudication has its own time for ripening." Whenever I encounter that statement, with its *ex cathedra* intimations, I think of Justice Holmes's observation: "It is one of the misfortunes of the law that ideas become encysted in phrases, and thereafter for a long time cease to provoke further thought." Frankfurter's metaphor is not objectionable if it means that the wisdom of a legal rule can best be appraised after it has been observed in operation. But it is unsupportable if, as is sometimes the case, it is used to justify indifference on the part of the Supreme Court to discordant interpretations of the federal Constitution, statutes, or regulations while it awaits returns from additional courts of appeals.

#### "Percolation" and "experiment"

It has been said, too, that conflicting views are useful in "provoking" review of the issue by the Supreme Court. "Percolation" or "simmering" among the various circuits is said to be beneficial to the ultimate product delivered by the Supreme Court if and when it takes a case involving the question.

There is no empirical evidence, so far as I have been able to ascertain, to support the thesis that a better or more lasting judicial product comes from the Supreme Court after citizens in some parts of the country have been subjected to different legal rules than those that are applied to citizens who live or conduct

business in other parts. To the contrary. Judge Henry Friendly said: "If a case involves questions of federal law of such importance as to be reviewed by the Supreme Court, the views of the courts of appeals count, and should count, for little. . . . Indeed, I think the Court should make more use of its power to grant certiorari before decision in the courts of appeals and thereby shorten the unduly long period required for the determination of issues that may affect large numbers of cases in the lower courts."

Robert Stern points out that the "percolation" process may and often does take years, and then he continues wryly: "The interest of a substantial body of the public in much more swift authoritative decision-making on issues of public importance would often seem of greater weight."

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**Different interpretations of federal law have been likened to field experiments. Nowhere does the Constitution give the Supreme Court the right to experiment with the legal rights of citizens.**

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If the Supreme Court truly feels a need for additional views, resources other than busy circuit judges are available. Amicus briefs would be supplied gladly by law teachers and the practicing bar.

Different interpretations of federal law have been likened to "field experiments" with the Supreme Court appraising the results before reaching its own conclusion. The notion of the Supreme Court's monitoring the results of experiments in more than 100 conflicting interpretations each year strains credulity. The Court's opinions do not suggest this activity, and nowhere does the Constitution give the Supreme Court the authority to experiment with the legal rights of citizens. The common denominator of these rationalizations is a kind of institutional myopia that focuses on abstractions and ignores the impact of the law on real people.

#### What regional differences?

It also has been suggested that conflicts of interpretation of federal law may be justified by regional differences. It is asked, for example, whether it is necessary that the law of the Ninth Circuit be identical with that of the Second and whether regional differences do not justify some inter-circuit conflicts. As a practical matter, I have never seen a spelling out of any specific regional interests that have been or might be advanced by conflicting applications of federal law from one circuit to another. And as a matter of political philosophy, a decision to regionalize national law should be made by elected officials and not by an *ad hoc* panel of appointed judges, randomly selected.

In none of the instances of circuit conflict that I know of has there been any intimation of a congressional purpose that a statute or regulation should bear differently on citizens, depending on the determination of the judges of a court of appeals. The soundness of a justification based on regionalism can be tested by considering whether Congress itself could make the same discriminations between citizens in the various circuits.

The boundary lines of the federal circuits remain basically as they were fixed in 1891 when the courts of appeals as we know them came into existence. They followed the earlier lines drawn for the circuit-riding justices of the Supreme Court. In 1929 the Tenth Circuit was formed from states formerly part of the Eighth Circuit, and in 1981 Congress carved a new Fifth Circuit and a new 11th Circuit from the former Fifth.

A law review note a few years ago suggested that inter-circuit conflict could be cured if Congress would "legislate the changes necessary to formalize the courts of appeals as panels of a National Court of Appeals." That change is unnecessary and undesirable. The congressional language that created the courts of appeals is the same that created the United States district courts: "There shall be in each circuit a court of appeals"; "There shall be in each judicial district a district court." That language has never been held to bar a court of appeals from imposing rules governing *stare decisis* on district courts. The suggestion also implies that Congress, if it wished to do so, could authorize the



fragmentation of federal law in accordance with the views of judges of the several courts of appeals.

When Congress created the first courts of appeals in 1891 and when it later altered their boundaries and created new ones, it did not intend to establish independent sovereign units. If Congress had intended to do so, it could not have achieved that result constitutionally.

### Intracircuit conflicts ended

It is now, I think, the universal rule that one three-judge panel of a court of appeals cannot overrule the decision of another three-judge panel. If the first decision is to be overruled, it must be done by the court of appeals sitting *en banc*. This result has been accomplished in part by the influence of Rule 35 of the Federal Rules of Appellate Procedure and to an even greater extent by the flat rulings of the various courts of appeals.

The internal operating procedures of the Third Circuit, for example, provide: "It is the tradition of this court that the internal stability of its panel decisions be preserved. To avoid conflicts in panel decisions, no subsequent panel may overrule a published opinion of a previous panel. Court *en banc* consideration is required to overrule a previous decision of the court." And the Fifth Circuit, in a decision that cited earlier opinions to the same effect, stated: "Prior panel decisions of courts of appeals may not be disturbed except upon reconsideration *en banc*."

If all of the United States courts of appeals had consistently applied the view expressed by Judge Lay in *Aldens, Inc. v. Miller*, 610 F. 2d 538 (8th Cir. 1979), the creation of new federal appellate courts might have been avoided. He stated:

"As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket. Unless our 11 courts of appeals are thus willing to promote a cohesive network of national law, needless division and confusion will encourage further splintering and the formation of otherwise unnecessary additional tiers in the framework of our national court system."

But the courts of appeals generally pursued a different course. The "further

splintering and formation of otherwise unnecessary additional tiers in the framework of our national court system" foreseen by Judge Lay already has occurred, with the division of the old Fifth Circuit and with the creation of the new Court of Appeals for the Federal Circuit. Proposals are pending in Congress for further splintering. I hope they can be avoided, and I think they can.

There will always be a minimal residue of conflicts because of the coincidental filing of contradictory opinions and unintentional contradictions. Their volume will not be serious. What is serious is the case of the deliberate consideration and rejection of the opinion—even the *en banc* opinion—of one court of appeals by another. Those deliberate conflicts can be eliminated or reduced to manageable proportions without the necessity for more courts.

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**The Supreme Court could provide that the first court of appeals decision would establish the proposition for all the circuits. That ruling would control until overruled by an *en banc* decision.**

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Intercircuit conflict can be ended by the same method and the same techniques that successfully solved the problem of conflicts within a single circuit. The Supreme Court has openly exercised supervisory power over the administration of justice in the federal courts since *Mapp v. Ohio*, 367 U.S. 643 (1961), and it existed and was exercised long before that.

By rule and decision the Supreme Court could require procedures that would sharply reduce the conflicts and increase the uniformity of national law. A Supreme Court rule could provide that the first panel decision of a court of appeals would establish the proposition for all of the courts of appeals, just as it now does for all subsequent three-judge panels within the circuit and for all of the district courts within the circuit. That

decision would remain controlling until it is overruled *en banc* by a court of appeals, either that or another circuit. That *en banc* decision would control until overruled by the Supreme Court.

The question immediately arises: What about the court of appeals judges of a different circuit who conscientiously believe that the governing decision is erroneous? Their situation is no different, I submit, than that of the district judge who is obligated to comply with a panel decision of his circuit regardless of his view as to its legal quality. There is nothing new about the concept of a nationally binding precedent. All judges throughout the nation are obligated to follow a decision of the Supreme Court of the United States—even a five-to-four decision they sincerely believe to have been wrongly decided.

A court of appeals judge who disagreed strongly with the governing decision would remain free to express his disagreement and the grounds for it. All of us are familiar with opinions that adhere to precedent while expressing the contrary views of the author of the opinion, and some of us have written them. To the extent that there may be value in the notion of "percolation" among the courts of appeals, that benefit can be gained without fragmenting the national law. And to the extent that discordant courts of appeals opinions may be thought to have value by way of "provoking" a ruling by the Supreme Court, that value too can be retained and perhaps enhanced by allowing a court of appeals to certify, on its own motion, its own decision to the Supreme Court. Review by that Court should not be compulsory, but I have no doubt that a case certified by a court of appeals would receive respectful attention.

The importance of a uniform body of national law is no less today than it was in Hamilton's day. Certainty can be increased and discordant interpretation can be reduced to a minimum by the exercise of existing judicial authority.

*Journal*

*(A former professor of law at Northwestern University Law School and justice of the Supreme Court of Illinois, Walter V. Schaefer now practices law in Chicago. This article is based on an address delivered in October, 1982.)*

REPORT OF THE SPECIAL COMMITTEE,  
FEDERAL COURT SECTION,  
ALLEGHENY COUNTY BAR ASSOCIATION

This Committee was appointed by David B. Fawcett, President of the Federal Section, in response to Judge Weis' invitation to the Allegheny County Bar Association to identify issues and to make recommendations to the Federal Courts Study Committee which Judge Weis chairs. Our Committee was requested to examine problems facing the federal courts and to propose recommendations based upon our combined past experience and current study and discussions during the Committee's existence.

The twelve-person Committee was drawn from the District Court bench and from members of the Bar who appear with regularity in the federal courts. The Committee's members represented, inter alia, the following categories:

two sitting federal court district judges, one of whom is Chief Judge of the Western District, and both of whom have previously served as judges in the State Courts;

one current Assistant United States Attorney, three former Assistant United States Attorneys, and one former United States Attorney for the Western District of Pennsylvania;

three former Presidents and the President-Elect of the Allegheny County Bar Association;

two former Presidents and the current President of the Allegheny County Academy of Trial Lawyers;

four permanent delegates to the Third Circuit Conference; and

one current Magistrate of the Western District of Pennsylvania who also serves on the Magistrates' Committee of the Judicial Conference of the United States.

The Committee worked actively from May, 1989 through August 25, 1989 and developed the enclosed proposals based upon its analyses and discussions of the various subject matters as well as on its review of relevant writings in the studied fields. In those areas where it was unable to develop the issues sufficiently to allow it to reach conclusions, but where the proposals seemed to have sufficient promise to merit further study, the Committee has recommended such further study.

The Committee's enclosed proposals are as follows:

- 1(a) Proposed Mission Statement
- (b) Commentary to the Mission Statement for the Federal Courts
2. Position Paper on Criminal Justice
- 3(a) Proposal on Arbitration
- (b) Commentary Relating to Arbitration Proposal
- (c) Area for Future Study - Early Neutral Evaluation
4. Proposal on Use of Federal Magistrates
5. Recommendation for Study of Modification of Right of Appellate Review



The background studies, articles, and statistics utilized by the Committee are not included with this report but are available for review.

The proposals contained in this report were approved by the Special Committee at its final meeting on August 25, 1989.

MEMBERS OF THE COMMITTEE

John H. Bingler  
Barbara Michak Carlin  
Robert J. Cindrich  
Hon. Maurice B. Cohill, Jr.  
Frederick N. Egler  
Thomas Hollander  
Edwin L. Klett  
Paul A. Manion  
W. Thomas McGough, Jr.  
Hon. Ila Jean Sensenich  
Hon. Donald E. Zeigler  
Roslyn M. Litman, Chair

Dated: August 31, 1989

Federal Court Study Committee

Proposed Mission Statement

The federal courts created by the Congress are to interpret and enforce the provisions of the Constitution and the laws and treaties of the United States, protect the rights of individuals granted by the Constitution and the Congress from encroachment by the states and the federal government, and provide a forum for the resolution of disputes as required by the Constitution and laws of the United States.

COMMENTARY TO THE MISSION STATEMENT  
FOR THE FEDERAL COURTS

The jurisdiction of the federal courts is set forth in Article III, Section 2 of the Constitution of the United States, as follows:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Thus, in considering the role of the federal courts in American society, it seems to us that the Constitution itself defines that role. In our view, the Constitution establishes a hierarchy of cases to which the federal judicial power extends. First and foremost among these, are cases arising under the Constitution itself, particularly those involving protection of the rights of individuals guaranteed by the Constitution against encroachment by the Government, whether state or federal.

Second, are cases arising under the laws and treaties of the United States.

Third, are those classes of cases specifically enumerated in the Constitution by its Framers, no doubt because it was felt at the time of its adoption that they involved matters vested with a peculiarly national rather than a state interest, e.g. cases affecting Ambassadors and other Public Ministers, admiralty and maritime cases, cases between citizens of different states, etc.

In considering the role of the federal courts in the future, it seems to us that cases arising under the Constitution, particularly those involving the protection of the rights of individuals guaranteed by the Constitution, should continue to be the paramount concern of the federal courts. Indeed, it is the preeminent role of the federal courts in construing the Constitution and protecting the rights of individuals guaranteed by it which has made our form of government the envy of the world. And it is this unique role of the federal courts which most dramatically contrasts our form of government with that of totalitarian societies.

Believing as we do that this should remain the chief concern of the federal courts in the future, the next logical question is whether there is any respect in which the judicial power of the United States, as set forth in the Constitution, should be altered because of changes which have occurred in the 200 years which have elapsed since its adoption which render those provisions no longer apposite.

Certainly, nothing has occurred during this period which would call for a change in the power of the federal courts to hear cases arising under the Constitution and the laws and treaties of the United States. Nor have changes occurred which would counsel in favor of altering the jurisdiction of the federal courts over the other classes of cases specifically enumerated in Article III, Section 2 of the Constitution, perhaps save one. Over the years, and particularly in recent years, statutory changes have been recommended to and adopted by Congress, and more substantial changes have been suggested more recently, with respect to one particular class of cases over which the federal judicial power is extended under Article III, Section 2, i.e. cases between citizens of different states. It is not the purpose of this paper to express a view either in favor of or against a Congressional change in the diversity jurisdiction of the federal courts. We point out only that, whatever statutory changes may be considered by Congress, complete elimination of the power of the federal courts to hear such cases may require a Constitutional Amendment to Article III, Section 2.

There does appear to be one area in which Congress could make a substantial contribution in enabling the federal courts to fulfill their mission under the Constitution. Without question, the greatest increase in the workload of the federal courts in the past 100 years has been wrought by Congressional legislation under which, irrespective of the de minimis nature of the federal

interest involved, jurisdiction over cases arising under such laws has been vested exclusively in the federal courts. Little, if any, consideration appears to have been given to whether the federal courts are really the most appropriate tribunals for adjudicating such cases. It is the vesting of exclusive jurisdiction in the federal courts under such laws -- certainly in the past 50 years and particularly in the period since the Second World War -- which has caused such a geometric increase in the workload of the federal courts. It must be remembered, however, that they are not courts of general jurisdiction but are creatures of limited jurisdiction under the Constitution. In light of this limitation and their inherently limited resources, Congress should in the future consider carefully in enacting federal legislation whether it involves such a substantial federal interest that cases arising under it should be vested:

- (i) exclusively in the federal courts;
- (ii) concurrently in the federal courts and in the courts of the respective states;
- (iii) solely in the state courts;\* or,
- (iv) in an administrative tribunal or other agency which it may empower to adjudicate such cases.

\* We point out that a Congressional mandate that cases arising under a particular federal law must be heard in a state court may raise some constitutional question under the Tenth Amendment or otherwise. But as we point out in the following paragraph, there is ample precedent for vesting jurisdiction over cases arising under federal law in the courts of the respective states, assuming of course that there is a sufficient federal interest to justify the enactment of the federal statute in the first instance.



Ample precedent for such an approach already exists. Thus, notwithstanding the provision in Article III, Section 2 extending the federal judicial power to cases of admiralty and maritime jurisdiction, Congress has wisely vested jurisdiction in certain of these cases in both the state and federal courts, e.g. the Jones Act. Other examples abound, e.g. the Federal Employers' Liability Act (FELA), the Securities Act of 1933, etc. Vesting concurrent jurisdiction in the state -- as well as the federal -- courts itself husband's the resources of the federal courts for it provides an additional, alternative tribunal for the adjudication of such cases. Indeed, in the past twenty years the provision in the FELA for concurrent jurisdiction over FELA cases in the state and federal courts has caused the virtual elimination of such cases from the docket of the United States District Court for the Western District of Pennsylvania. Where there is concurrent jurisdiction, litigants will select the tribunal which seems best suited to satisfy their needs.

Likewise, there are numerous federal statutes the primary enforcement of which has been vested by Congress in an administrative agency which is much better equipped with the expertise and personnel to enforce such laws, e.g. the National Labor Relations Act, the Clean Air and Clean Water Acts and other environmental laws, the Occupational Safety and Health Act. In such cases, the jurisdiction of the federal courts is primarily that of a court of review rather than one of original jurisdiction.

Finally, there are many federal laws which do not involve such a peculiarly federal interest as should mandate the adjudication of cases arising thereunder by a federal court, e.g. the Truth-in-Lending Act and other Consumer Protection legislation, which state courts may be equally -- if not better -- suited to hear.

In this regard, we understand that the Committee is considering recommending that in the future all federal legislation which may give rise to litigation in the federal courts must contain a "judicial impact" statement. We express no opinion on the wisdom of such an absolute requirement, given some of the problems which have arisen from the Congressional requirement of "environmental impact" statements in environmental legislation. However, we do favor recommending that Congress provide some permanent means for evaluating the impact of proposed legislation on the workload of the federal courts and making a reasoned recommendation as to the tribunal to which cases arising thereunder should be assigned.

# SPECIAL COMMITTEE ON FEDERAL COURT STUDY

## POSITION PAPER: POSITION PAPER ON CRIMINAL JUSTICE

Public Law 100-702, effective November 19, 1988, created the Federal Courts Study Committee on the future of the federal judiciary to examine problems and issues currently facing the courts of the United States and to develop a long-range plan for the future of the federal judiciary. In May 1989, the Federal Court Section of the Allegheny County Bar Association created our Committee to offer ideas and support to the Federal Court Study Committee, with particular emphasis on issues pertinent to the federal courts in the Western District of Pennsylvania.

No study of the problems and issues facing federal courts, nor any long-range plan for those courts, would be complete without detailed consideration of the criminal side of the docket. Although criminal filings constitute only 13.4 percent of the weighted filings in federal court for the year ended June 30, 1988,<sup>1</sup> there is a universal perception that criminal cases are consuming an ever-larger share of our federal judicial resources.

Available statistics appear to confirm this perception. From the peak year of 1982, when federal courts across the country

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<sup>1</sup> Annual Report of the Director of the Administrative Office of the United States Courts, 1988, Table X-1. (Hereinafter "Annual Report"). The comparable figure for the Western District of Pennsylvania was 7.2 percent.

completed 21,397 trials (both civil and criminal), to 1988, when the number of trials completed was 19,901, civil trials have declined by 8.5 percent while criminal trials have increased by nearly 11 percent.<sup>2</sup> As a result of these opposing trends, the percentage of total trials attributable to criminal proceedings rose from 31 percent in 1982 to 37 percent in 1988.<sup>3</sup> Even in districts like ours where, as a statistical matter, the number of new criminal filings has decreased over that same period, the complexity of the newest matters more than compensates for this decrease. As Chief Judge Cohill noted in his Report to the Judicial Conference of the United States Court of Appeals for the Third Circuit, numerous lengthy criminal trials in the year ended June 30, 1988, had obliterated any advantage that might have arisen from a significant decrease in new criminal filings and, according to Judge Cohill, were a major cause of what was a serious increase in pending civil cases over three years old.

All indications are that this criminalization of the federal docket will continue in both the short and long term. Recent legislation, most notably the recent increase in the jurisdictional amount for diversity and the increasing use of magistrates in civil litigation, may bode well for the federal court's ability to handle its civil case load. Recent developments on the criminal side of the ledger, however, have all

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<sup>2</sup> Annual Report, Table S-19.

<sup>3</sup> Id.

pointed in the opposite direction; emphasis on complex conspiracy cases, promulgation of the new sentencing guidelines, and increased availability and use of forfeiture are just a few of the developments that will drive this trend for the foreseeable future.

Our Committee's proposals to cope with this anticipated trend range from the general to the specific. They assume that the federal courts will have to make do with modest increases in the resources available to them, not because our Committee believes such resources are or should be adequate, but rather because the self-evident need for additional resources is beyond the scope of this particular position paper.

Our proposals then are as follows:

1. Congress must play a greater role in setting criminal priorities on a prospective basis.

Since the beginning of our republic, the individual states have had responsibility for general police powers and the enforcement of most criminal prohibitions. Until the latter half of this century, when most states, including Pennsylvania, moved to comprehensive codifications of criminal law, the definitions of offenses were generally derived from the common law and adapted by courts and prosecutors to match emerging trends in criminality.

The evolution of criminal jurisprudence in the federal system has been almost the opposite. Federal courts have always been powerless to define a federal common law of crime. Instead, their criminal jurisdiction is, as a constitutional matter, purely a creature of statute. Until the latter half of this century, federal criminal jurisdiction was limited, by statute and practice, to specific offenses implicating interests that were primarily federal.

More recently, however, there has emerged what can only be described as a federal common law of crimes defined largely by federal prosecutors and federal judges with the acquiescence, rather than the guidance, of Congress. This trend is most notable in regard to such elastic crimes as conspiracy (18 U.S.C. § 371), mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), and the Hobbs Act (18 U.S.C. § 1951).

To the extent that Congress has been involved in this process at all, it has encouraged it. Through the enactment of such expansive criminal statutes as RICO (18 U.S.C. § 1961, et seq.) and Continuing Criminal Enterprise (21 U.S.C. § 848), it has ceded to courts and prosecutors tremendous authority to define the contours of federal criminal jurisdiction. Indeed, on one recent occasion when the Supreme Court of the United States attempted to cede back to the legislature some of the discretion given to the courts by the definitional elasticity of the mail fraud statute, Congress reacted by enacting a statute that specifically restored



that definitional elasticity. See McNally v. United States, \_\_\_ U.S. \_\_\_, 107 S.Ct. 2875 (1987); P.L. 100-690, § 7077 (Nov. 18, 1988).<sup>4</sup>

Perhaps most tellingly, in 1984 Congress delegated to the judicial branch the most important mechanism for defining priorities in any criminal justice system, the responsibility for structuring a sentencing hierarchy. The product of the United States Sentencing Commission, while commendable in its scope and apparently constitutional in its application, reflects one more step by Congress away from its proper role as the definer of criminal offenses and criminal priorities in the federal system.

Our Committee believes that the time has come for Congress to reassert itself in this area. To invert an old adage, by making nothing a priority, Congress has made everything a priority. The result has been an unprecedented, and

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<sup>4</sup> In McNally, the Supreme Court held that the mail fraud statute covered only schemes and artifices to defraud victims of tangible property, and did not cover schemes where the victims were defrauded of intangible rights. This latter interpretation of the mail fraud statute had theretofore served as a cornerstone of numerous prosecutions of government officials, who were charged with defrauding the public of its right to their honest services.

Within a year and a half of McNally, Congress enacted, and President Reagan signed into law, section 1346 of Title 18, United States Code:

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

constitutionally suspect, shifting of the authority to define crimes and criminal priorities from the legislative branch to the judicial and executive branches.

Some of the areas in need of particular Congressional attention are the following:

- a. Statutes defining mail fraud, wire fraud, and Hobbs Act violations should be reexamined and redefined to focus them upon offenses that implicate peculiar federal interests or require, by their very nature, federal intervention;
- b. Statutes governing drug offenses should be recast to define more clearly the federal government's role and priorities in drug enforcement. At least some members of our Committee believe that this analysis should include a reexamination of the question whether decriminalization of drug use is appropriate.
- c. Congress should consider a comprehensive revision of the federal criminal code that would establish more appropriate grades of offenses and increase the availability of civil fines or misdemeanors as sanctions for conduct falling below certain jurisdictional levels or outside certain parameters.

Congress should also consider completely eliminating some de minimus offenses from the federal criminal code.

- d. Within the framework of this redefinition, Congress should consider the availability of federal magistrates to handle an increased portion of the criminal docket, including jury trials in misdemeanor cases, without the necessity for the consent of the parties.

2. Congress should examine creative ways of assisting the state courts in recovering aspects of their traditional criminal jurisdiction lost to the federal courts in recent years.

One facet of the expansion of federal presence in the criminal area is the concomitant loss by the states of control over cases and investigations that historically would have been their own. This shift is particularly noticeable in the area of drug enforcement, where, in many cases, federal efforts are predicated on the supposed inability of state officials to investigate violations with interstate implications. Our Committee is in general agreement that Congress should give serious thought to enacting a statute that would allow state courts and grand juries to apply to federal courts for assistance in gaining nationwide service of subpoenas and other process in various categories of criminal cases including, but not limited to, those involving drug offenses. Such a statute would, we

believe, allow states to reassume many investigations and prosecutions that must now, of necessity, be ceded to the federal government.

3. The Advisory Committee on Rules should consider revision of the Federal Rules of Criminal Procedure to encourage more frequent use of non-jury trials.

During the twelve month period ending June 30, 1988, federal courts across the country concluded criminal cases involving a total of 52,791 defendants. Of those dispositions, 1,720, or 3.3 percent, came about as the result of non-jury trials.<sup>5</sup> During that same period, according to the Annual Report of the Director of the Administrative Office of the United States Courts, there were no non-jury trials in the Western District of Pennsylvania.<sup>6</sup>

Our Committee is in general agreement that an increased use of non-jury trials would improve the efficiency of disposing of criminal matters. This impression would seem to be borne out by statistics indicating that the median time for disposition of

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<sup>5</sup> Annual Report, Table D-6.

<sup>6</sup> Id.

criminal charges against a defendant by a jury trial is 5.7 months, while the median time for disposition by non-jury trial is .6 months.<sup>7</sup>

Our Committee is also in agreement as to the reason for the scarcity of non-jury trials, especially in this district. Rule 23(a) of the Federal Rules of Criminal Procedure provides that "cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." In the Western District of Pennsylvania, it has been the official or unofficial policy of the government to consent to non-jury trials only in the rarest of instances, if at all.

Various justifications have been offered for this policy. Perhaps most significantly, there is an unwillingness by the government to create the perception that it will consent to non-jury trials before some judges but not before others. Moreover, the government contends, the allocation of its own resources does not differ significantly between jury and non-jury trials. Finally, it has been suggested that a non-jury trial, in some instances, provides a judge with an opportunity to veto a prosecutorial decision to bring a legally sufficient but marginal case into the federal system.

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<sup>7</sup> Id.

In response to an inquiry from our Committee, Edward S.G. Dennis, Jr., Assistant Attorney General for the Criminal Division of the United States Department of Justice, indicated that the government would oppose any effort to eliminate the requirement for bilateral consent. According to Mr. Dennis,

There are cases in which the government feels a jury trial should occur, notwithstanding the defendant's desire to waive the presence of a jury. For example, in public corruption cases, a jury trial tends to assuage public concerns that the defendant may receive unduly favorable treatment by the prosecution or the court. Many of the reasons that a defendant may want a jury trial also pertain to the government. If a judge has been exposed to excessive pretrial publicity, or may have excluded some evidence, such as evidence of the character of a victim, which might tend to influence a verdict, it may well be in the interest of the government to seek a jury trial.

Finally, the proposed amendment to Rule 23(a) would not have a significant impact on the workload of the courts, as the government does not routinely object to the waiver of a jury trial by defendants.

Our Committee is not in a position at this time either to measure the impact on dockets of more frequent non-jury trials or to evaluate the merit of the government's resistance to such dispositions. In the absence of a systematic study of this issue, we can only suggest that the Advisory Committee on Rules consider the effect and advisability of amending Rule 23(a) to allow a defendant the sole option of electing to proceed in a jury trial or a non-jury trial.



Proposal on Arbitration

This Committee recommends that court-annexed arbitration be utilized in the District Courts of the United States. In this process, we believe it is important that the participation of experienced trial counsel as arbitrators be actively sought by the District Courts.

Commentary Relating to Arbitration Proposal

Our effort in exploring expedited dispute resolution procedures has been far reaching and extensive. Our undertaking has included an investigation of the various statutory authorizations such as that involving arbitration (28 U.S.C. §§ 651-655) and a literature search focusing on a variety of expedited dispute resolution procedures. We have examined the local rules which embody the court-annexed compulsory arbitration system in place in the Eastern District of Pennsylvania (Local Civil Rule 8) as well as the early neutral evaluation procedure employed in the Northern District of California (General Order No. 26). A member of our Committee, Barbara M. Carlin, Esquire, has met with Raymond J. Broderick, United States District Court Judge for the Eastern District of Pennsylvania, concerning that court's compulsory arbitration system. That visit also included conferring with the court staff, arbitrators and litigants and witnessing first hand the arbitration process. Likewise, direct telephonic consultation has been undertaken with the court staff of the Northern District of California concerning the early neutral evaluation system employed in that District. Similar consultation has taken place with former United States Attorney General Benjamin Civiletti with respect to the role of a facilitator in the expedited dispute resolution process.

All of these informed sources reflected favorably upon the systems about which we sought comment. Our independent analysis has reached similar conclusions.

Briefly summarized, the particulars of these expedited dispute resolution techniques are these:

I. Court-annexed arbitration

A. Procedure and types

1. Compulsory: All civil actions below a specified dollar amount in which the relief sought is limited to a claim for money damages (with certain constitutional and statutory exceptions<sup>1</sup>), with the right to a trial de novo being available if requested within a stated time period.

2. Consensual: Any other civil action in which the parties consent to the referral; no monetary limitations would be applicable to such consensual referrals.

B. Local Rules

The type and scope of the arbitration system established in any specific district would be by local rules.

II. Early Neutral Evaluation

A. Procedure

1. A pre-arbitration/pre-trial system in which an evaluator (a private attorney possessing expertise in the involved

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<sup>1</sup> Pursuant to 28 U.S.C. §652, this would include any action based on an alleged violations of a right secured by the Constitution of the United States and cases involving violations of 28 U.S.C. §1343 (civil rights).

area of the law) meets with trial counsel for the purpose of appraising the value of the case and offering suggestions possibly leading to settlement. The process also may lead to a narrowing of the issues and more focused discovery in the case.

2. Counsel for the parties are given an opportunity to present factual and legal arguments to the evaluator.

3. Early neutral evaluation differs from court-annexed arbitration in that settlement discussions are encouraged between the parties and the evaluator.

4. The system can involve a process which is ongoing, and can be employed simultaneously and in harmony with arbitration, as well as with the usual trial process.

5. In some legal arenas the "evaluator" may be referred to as a "Facilitator" or "Conciliator".

#### B. Local Rules

The procedure would be established by local rules, and could be either compulsory or consensual.

Area for Future Study

The Committee considered a proposal on Early Neutral Evaluation but did not have sufficient time to complete a study. The Committee recommends that future study be made of this process.

Early Neutral Evaluation

A. Procedure

1. A pre-arbitration/pre-trial system in which an evaluator (a private attorney possessing expertise in the involved area of the law) meets with trial counsel for the purpose of appraising the value of the case and offering suggestions possibly leading to settlement. The process also may lead to a narrowing of the issues and more focused discovery in the case.
2. Counsel for the parties are given an opportunity to present factual and legal arguments to the evaluator.
3. Early neutral evaluation differs from court-annexed arbitration in that settlement discussions are encouraged between the parties and the evaluator.
4. The system can involve a process which is ongoing, and can be employed simultaneously and in harmony with arbitration, as well as with the usual trial process.
5. In some legal arenas the "evaluator" may be referred to as a "Facilitator" or "Conciliator".

B. Local Rules

The procedure would be established by local rules, and could be either compulsory or consensual.

### Proposal on Use of Magistrates

This Committee makes the following proposals for utilizing magistrates in the district courts where the caseload is increasing and the magistrates are qualified to fulfill the functions recommended.<sup>1</sup>

Magistrates should handle a certain percentage of all civil cases, from filing until trial, the percentage to be determined locally.

Magistrates would handle non-dispositive matters including status conferences, settlement conferences and pre-trial conferences with parties having the right to appeal non-dispositive rulings to a judge.

Magistrates would submit reports and recommendations to the court on dispositive matters including motions to dismiss, motions for judgment on the pleadings and motions for summary judgment. The parties would have the right to object to the magistrate's report and recommendations and to have plenary consideration of the matter by the court.

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<sup>1</sup> Because of time constraints the Committee was unable to examine independently the issue of the qualifications of federal magistrates.



Recommendation for Study of Modification of Right  
of Appellate Review

The Committee believes that the appropriate Sub-committee of the Federal Courts Study Committee should review carefully the suggestions of several commentators that the right of appellate review by the courts of appeals should be modified by statute limiting appeals to discretionary review in certain types of civil actions. See, e.g., Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62 (1985); Lay, A Proposal for Discretionary Review in Federal Courts of Appeals, 34 Southwestern L.J. 1151 (1981); Address by [Chief] Justice Rehnquist, University of Florida Law School (Sept. 15, 1984). Time does not permit this Committee to determine the institutional cost-benefit effect or the consequences for litigants. However, the allocation of judicial resources in the future may require the limitation of the right of appeal to issues of life, liberty or property, or other significant federal questions.

# Federal Courts Study Committee

22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, PA 19106-1722

Judge Joseph F. Weis, Jr.  
Chairman

Telephone: 215-597-3320  
Facsimile: 215-597-3350

William K. Slate, II  
Director

Steven G. Gallagher  
Counsel

J. Vincent Aprile, II  
Judge Jose A. Cabranes  
Chief Justice Keith M. Callow  
Chief Judge Levin H. Campbell  
Edward S.G. Dennis, Jr.  
Senator Charles E. Grassley  
Morris Harrell  
Senator Howell Heflin  
Congressman Robert W. Kastenmeier  
Judge Judith N. Keep  
Professor Rex E. Lee  
Congressman Carlos J. Moorhead  
Diana Gribbon Motz  
Judge Richard A. Posner

## SURVEY OF THE UNITED STATES CIRCUIT JUDGES

### SUMMARY OF RESPONSES <sup>1</sup>

Active Judges: 88% response rate (133 of 152)  
Senior Judges: 30% response rate (23 of 76)

[Please complete the following questionnaire and return it in the envelope provided. We would appreciate its return by September 22, 1989.]

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1. Compiled by Fernando A. Gallard and Marsha J. Wood, October 4, 1989.

**PART I: Please circle the appropriate response.**

**1. When were you appointed to your PRESENT position?**

after 1983	45
1978-1982	47
1973-1977	17
1968-1972	20
before 1968	25

**2. If you previously served as a trial judge, were you in a state or federal court?**

State	19
Federal	52
Not Applicable	70

**3. Please indicate the court of which you are a member?**

1st Circuit	7
2	6
3	11
4	17
5	17
6	10
7	6
8	6
9	27
10	6
11	12
D.C.	7
Fed.	12

**4. IF IN SENIOR STATUS, approximate caseload:**

1 - 24%	1
25 - 49%	10
50 - 74%	8
75 - 100%	4

**PART II:** Below are some statements about the possible effects of caseload pressures on how you do your work. Please circle the response that best reflects your experience.

1. (a) How frequently are you forced to rely on your clerks to do some things that you believe you should do yourself?

Never	18
Almost Never	37
Sometimes	48
Often	40
Usually	9

(b) If you are forced to rely on your clerks to do some things you believe you should do yourself, what is the nature of that work? Please attach additional sheets if necessary.

(see comments)

- (c) How does the situation today compare with the situation when you became an appellate judge:

Much Worse	13
Worse	73
No Change	54
Better	5
Much Better	1

2. (a) How frequently are you forced to rely on central staff to do things that you believe you should do yourself?

Never	44
Almost Never	60
Sometimes	54
Often	11
Usually	0

(b) If you are forced to rely on central staff to do some things that you believe you should do yourself, what is the nature of that work? Please attach additional sheets if necessary.

(see comments)

(c) How does the situation today compare with the situation when you became an appellate judge?

Much Worse	10
Worse	39
No Change	82
Better	6
Much Better	2

3. (a) How frequently are you required to forego writing opinions for publication in cases you believe should be decided by published opinion or otherwise reduce the amount of time you spend on a written opinion?

Never	30
Almost Never	59
Sometimes	45
Often	16
Usually	3

(b) How does the situation today compare with the situation when you became an appellate judge?

Much Worse	5
Worse	55
No Change	78
Better	4
Much Better	0

4. (a) How frequently do you feel you are required to forgo argument in cases that could benefit from it?

Never	70
Almost Never	49
Sometimes	28
Often	6
Usually	0

(b) How does the situation today compare with the situation when you became an appellate judge?

Much Worse	3
Worse	25
No Change	105
Better	6
Much Better	0

5. (a) How frequently do you feel that you do not have enough time to prepare adequately for oral argument?

Never	19
Almost Never	43
Sometimes	56
Often	29
Usually	7

- (b) How does the situation today compare with the situation when you became an appellate judge?

Much worse	12
Worse	57
No Change	73
Better	6
Much Better	0

6. (a) Do you feel that the caseload pressures have an adverse effect on how you work?

Never	10
Almost Never	20
Sometimes	84
Often	21
Usually	17

- (b) How does the situation today compare with the situation when you became an appellate judge?

Much Worse	16
Worse	71
No Change	59
Better	3
Much Better	0

7. Please provide any additional information concerning effects -- if any -- of caseload pressures on how you do your work. Are there any areas not mentioned above that are affected by caseload? Has collegiality on your court been affected? Have your work habits or working hours changed? If so, how? If you need more space, please attach additional sheets.

(see comments)



**PART III: Court Size.**

Court size refers to the number of judges in active service on the court.

**1. How do you like your court's present size?**

It should be smaller	30
About right, and I would resist any increase	61
About right, but I would have no objection to a larger court	52
Too small	5

**2. Has the size of your court changed since you have been a judge?**

yes	115
no	34

**3. What do you regard as the ideal size of a federal court of appeals?**

5-7 judges	18
8-10	67
10-15	44
15-20	3
Over 20	8

**4. What do you regard as the outer limit upon the size of a federal court of appeals if the court is to function properly and effectively?**

7 judges	1
9	10
12	32
15	58
20	17
25	2
30	3
35	2
40	3
45	0
Unlimited	14

5. What do you see as the chief disadvantages of a large circuit?

No disadvantages	7
Lack of collegiality	104
Lack of openness in decisionmaking among judges	42
Inconsistencies in the law as pronounced by the different panels	103
Difficulty for bench and bar in keeping track of precedent	73
Other (appendix)	41

6. If you could choose between adding judges to your court as the caseload grows and not adding judges (not withstanding the growth in caseload), what would you do?

I would add judges	81
I would resist adding judges even if my own share of the caseload increases significantly	50
I would resist adding judges even if the backlog increases	17

7. Various authorities have estimated that federal appellate judges can effectively handle 225-255 decisions on the merits of each (either as writing judge or panel member). In your opinion are such figures:

Too high	32
Too low	21
About right	93

8. In your view, what number of decisions on the merits would be intolerably high?

0 - 49 annually	0
50-99	1
100-149	0
150-199	4
200-249	3
250-299	21
300-349	4
350-399	0
400+	9

9. It now takes about 10 months, on the average, between the filing of a notice of appeal and the disposition. How long a period would you regard as intolerable?

1-4 months	0
5-9	12
10-14	62
15-19	20
20-24	1
25+	2

10. If your answer to 6 is to resist adding new judges, would you wish additional staff or other methods to enable the same number of judges to handle increased caseload? (You may indicate several)

No new methods or staff would likely be needed	13
Add staff attorneys/ law clerks	31
Further reduce writing opinions	46
Further reduce oral argument	23
Provide relief on motions	26
Provide relief on administration	20
Other (see comments)	20

11. My court has en banc hearings:

Too often	24
About as often as necessary	109
Not often enough	16

12. How do you react to the concept of a small en banc panel (i.e., less than a whole court)?

I would prefer such a panel	41
I would oppose such a panel	94
I am indifferent	12

13. If caseload increases, would you favor eliminating appeal as of right, and accepting appeals only by leave of court?

yes	88
no	60

14. I think that the addition of more specialized courts would be:

Very desirable	14
Desirable	38
Of no great importance either way	8
Undesirable	51
Very undesirable	39

15. If you favor more specialized courts, what areas would be most appropriate (check all that apply):

Social Security	64
Tax	45
Administrative	30
Other (see appendix)	16

**PART IV: Methods (optional)**

We recognize that some of these questions may, to some respondents, seem intrusive. Feel free to skip any that you do not wish to answer.

**IN THE FOLLOWING SECTION PLEASE CHECK ALL THAT APPLY**

**1. Pre-Argument Preparation**

**a. Time:**

I have sufficient time to prepare for oral argument	115
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I do not have sufficient time to prepare for oral argument	35
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**b. Bench memorandum:**

I always have a bench memorandum prepared	84
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I sometimes have a bench memorandum prepared	42
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I rarely or never have a bench memorandum prepared	25
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**c. In my court the opinion writing judge is assigned prior to  
oral argument:**

often	5
sometimes	11
rarely	20
never	117



## 2. Oral Argument

### a. In my court oral argument times are often:

too short	11
about right	121
too long	19

### b. I find oral argument:

very helpful	42
often helpful	92
rarely helpful	18

### c. My mind is changed by oral argument:

often	4
sometimes	117
rarely	31
never	1

## 3. Post-Argument

### a. In cases in which I am the writing judge:

I prepare the first draft in all cases	13
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I prepare the first draft in some cases	112
--	-----

I never prepare the first draft	22
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### b. I feel that I have sufficient time for the drafting of opinions:

always	28
often	80
almost never	34
never	6

c. In cases where I am not the writing judge:

I spend more time than I used to	11
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I spend about the same time as I used to	91
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I spend less time than I used to	42
-------------------------------------	----

I spend much less time than I used to	6
--	---

d. In non-argued cases:

I rely on the staff draft opinion greatly	31
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I almost always go through the record and law thoroughly myself	42
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I sometimes go through the record and law thoroughly myself	46
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My law clerks usually go through the record and law for me	22
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## PART V: Overall Impressions

### 1. The current workload is:

overwhelming	39
heavy, what I was used to before I became a judge	87
busy, but not burdensome	23
fairly relaxed	1
no problem	0

### 2. The job is:

More satisfying than when I came on	12
Less satisfying than when I came on	62
About as satisfying as when I came on	73

### 3. If I were offered this position again:

I would jump at the opportunity	45
I would give the matter careful thought	89
I would decline the offer	15

4. I feel that the different panels in our circuit follow circuit precedent.

always 49

usually 88

less often than 13  
they should

5. I feel that the opinions of our circuit are:

consistent with each 58  
other

fairly consistent 74

less consistent than 19  
they should be to  
provide a reliable  
guide to lawyers and  
lower courts

6. Practices followed by my court which are helpful:

(see comments)

7. Practices followed by my court which are bothersome and unnecessary:

(See comments)

October 4, 1989

**Survey of United States Circuit Judges**  
**APPENDIX<sup>2</sup>**

**Active Judges: 88% response rate (133 of 152)**  
**Senior Judges: 30% response rate (23 of 76)**

**Part III - Question 5- "other"**

Question 5 reads: What do you see as the chief disadvantage of a large circuit?

- 1) Reading slip opinion and functioning as a court (illegible) than as panels of disconnected panels. The en banc procedure is too difficult. (7)
- 2) To many advance sheets to read. (9)
- 3) a) Difficulty, time, and expense of operating a too large institution.  
b) In addition to inconsistencies, the judges feel that the law is not centralized, unified and fine-tuned. (12)
- 4) Adding judges to a single court - beyond 10 or 12 - merely slows down the progress of a case through that court. Adding a district judge creates a new district court. Adding a court of appeals judge makes the existing court more bureaucratic. (13)
- 5) Compromising in banc procedures, loss of jurisprudential integrity. (14)
- 6) There are disadvantages and advantages which offset each other. In most circumstances, a large circuit is a plus. (18)

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2. The number following each comment identifies the corresponding survey.

- 7) Lack of opportunity for informal meetings (lunches, dinners, etc.) at which judges can share ideas, concerns, about cases in specific and the work of the court in general (this is probably just another description of lack of collegiality in the broadest sense of the term). (23)
- 8) Not a "lack " of collegiality. (26)
- 9) A large circuit requires special administrative skills. (26)
- 10) -excessive reliance on staff  
-excessive reliance on unpublished opinions  
-adverse impact on bar which tends to review panel selection as a giant roulette wheel and result as determined solely by idiosyncracies of judges thus selected. (27)
- 11) More paper, more to mail, more to read, inefficiency, incredible amount to internal communication to deal with, unwieldiness and bureaucratic inefficiency. (38)
- 12) Increased communication, problems between judges; also increased numbers of opinions to review, petition for rehearing to consider. (48)
- 13) Uncontrolled delays in writing opinions, lack of self-discipline by judges, inability or unwillingness to manage well or exercise some control by the chief judges. (52)
- 14) Loss of prestige. (55)
- 15) The less often you sit with colleagues, the less there is a shared effort to evolve a panel result and a panel opinion. The opinion writer plays too large a role in resolution of all but the lesser issues in the case. (58)
- 16) Difficulty of each judge keeping abreast of what other judges are deciding. (69)
- 17) Hard to make overall policy by personal interaction. (72)
- 18) Loss of prestige. (75)
- 19) Lack of individual close personal relationships. (79)
- 20) The society as a whole suffers, because it finds itself unable to discern the rule of law and conform to it. Society inevitably loses respect for the law and the law givers. (85)



- 21) Inconsistencies are correctable. (88)
- 22) Inadequate conferences on decisions. (93)
- 23) Lack of personal satisfaction - i.e. feeling of being small cog in a large machine. (97)
- 24) With size the danger of separate loops (for discussion and decisions) and cliques increases. (98)
- 25) Ceases to act as a cohesive body. (100)
- 26) En banc cases too unwieldy. (101)
- 27) Increase in administrative data. (108)
- 28) Requires special administrative skills. (109)
- 29) Declining respect for the office and authority of United States Court of Appeals. (113)
- 30) Danger, especially over time, of lack of institutional discipline, leading to breakdown of respect for the institution. (115)
- 31) Lack of awareness of colleagues' idiosyncracies. (117)
- 32) Travel. (118)
- 33) Lack of confidence in the work of others is binding precedent and lack of time to study the case in depth. This is not as egotistic as it sounds. We have new judges and some others who rely heavily on inexperienced clerks in some instances, one never knows when. (120)
- 34) Polarization of views. (123)
- 35) Burden of slip opinion reading. (127)
- 36) Because Congress does not keep up with its duty to match the number of judges to the size of the world (population), a large circuit (in terms of the number of judges) will embrace a considerably larger population area (and litigation) than the active judges can handle. (129)
- 37) Keeping up with increased output (1) in opinion (2) (illegible) rehearing en banc (3) administrative matters. (133)
- 38) Hard to get communications back and forth. (140)

- 39) Too big for interaction on decision affecting court operation. (144)
- 40) Tendency of court to develop units of collegiality within court. (150)

Part III - Question 10 - "other"

Question 10 reads: If your answer to 6 is to resist adding new judges, would you wish additional methods to enable the same number of judges to handle increased caseload?

- 1) Judge time - an increasingly scarce asset - should be reserved for judicial work. Judges should not use their time on administrative work that can be handled by capable administrative people. (13)
- 2) There should be created some quasi-judicial offices for courts of appeals. Magistrates could deal with the vast majority of motions in a case. Eliminate diversity jurisdiction! (13)
- 3) A better utilization of technology. (18)
- 4) Reduce substantially the permissible number of pages per brief (to, say, 35-25-10). (23)
- 5) In number of cases, merely affirm without opinion, where (illegible) is indicated. (31)
- 6) Judges spend too much time in these subjects (further reduce oral argument, provide relief administration). They could learn a great deal from the speed/efficiency of state motion practice. There is too much posturing and not enough decision making in the court of appeals. (33)
- 7) Adopt internal policies. (43)
- 8) Have an effective screening system. (52)
- 9) More cases could well be decided from the bench. (57)
- 10) Let backlog grow and create pressure to cut intake. (58)
- 11) Reduce caseload! (61)
- 12) I would favor a 4th law clerk or assignment from staff attorney's office. (63)
- 13) Pre-trial hearings; e.g. 6th circuit, 2nd circuit. (68)
- 14) Appellate magistrates. (70)
- 15) Let back load build or else have certiorari jurisdiction like the Supreme Court of the United States. (90)

- 16) Rule from the bench; one line in more affirmances. (114)
- 17) Take some categories of cases out of system. (135)
- 18) Relieve court of certain types of cases. (139)
- 19) Mediation and other "ADR" methods. (141)
- 20) Increase costs to appellants. (142)
- 21) Consider specialty courts similar to veteran's. (144)

Part III - Question 15 - "other"

Question 15 reads: If you favor more specialized courts,  
What areas would be most suitable?

- 1) Veterans, Habeas corpus (6)
- 2) Black lung (23)
- 3) Always exists in practical reality for more than half of  
all administrative cases other than social security. (27)
- 4) Habeas corpus (29)
- 5) Immigration (55)
- 6) Drug cases, prisoner rights (72)
- 7) Conflicts among circuits (75)
- 8) Bankruptcy (77)
- 9) Black lung (95)
- 10) Sentence guidelines; antitrust; other entitlements (black  
lung, etc.) (115)
- 11) Black lung (125)
- 12) Govern under Civil Rights, title VII, etc. (133)
- 13) Prisoner claims for damage to property and conditions  
not on Constitutional grounds. (136)
- 14) Securities (145)

# Federal Courts Study Committee

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Independence Mall West  
601 Market Street  
Philadelphia, PA 19106-1722

Judge Joseph F. Weis, Jr.  
Chairman

William K. Slate, II  
Director

Steven G. Gallagher  
Counsel

Telephone: 215-597-3320  
Facsimile: 215-597-3350

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Judge Judith N. Keep  
Professor Rex E. Lee  
Congressman Carlos J. Moorhead  
Diana Gribbon Motz  
Judge Richard A. Posner

September 7, 1989

## SURVEY OF UNITED STATES CIRCUIT JUDGES

Please complete the following questionnaire and return it in the envelope provided. We would appreciate its return by September 22, 1989.

PART I: Please circle the appropriate response.

1. When were you appointed to your PRESENT position:

after 1983      1978-1982      1973-1977      1968-1972      before 1968

2. If you previously served as a trial judge, were you in a state or federal trial court?

State      Federal      Not Applicable

3. Please indicate the court of which you are a member: \_\_\_\_\_

4. IF IN SENIOR STATUS, approximate caseload:

\_\_\_\_\_ % of active caseload.



**PART II:** Below are some statements about the possible effects of caseload pressures on how you do your work. Please circle the response that best reflects your experience.

1. (a) How frequently are you forced to rely on your law clerks to do some things that you believe you should do yourself?

Never      Almost Never      Sometimes      Often      Usually

(b) If you are forced to rely on your clerks to do some things that you believe you should do yourself, what is the nature of that work? Please attach additional sheets if necessary.

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(c) How does the situation today compare with the situation when you became an appellate judge:

Much Worse      Worse      No Change      Better      Much Better

2. (a) How frequently are you forced to rely on central staff to do things that you believe you should do yourself?

Never      Almost Never      Sometimes      Often      Usually

(b) If you are forced to rely on central staff to do things that you believe you should do yourself, what is the nature of that work? Please attach additional sheets if necessary.

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(c) How does the situation today compare with the situation when you became an appellate judge?

Much Worse      Worse      No Change      Better      Much Better

3. (a) How frequently are you required to forego writing opinions for publication in cases you believe should be decided by published opinion or otherwise reduce the amount of time you spend on a written opinion.

Never      Almost Never      Sometimes      Often      Usually

(b) How does the situation today compare with the situation when you became an appellate judge?

Much Worse      Worse      No Change      Better      Much Better

4. (a) How frequently do you feel you are required to forgo argument in cases that could benefit from it?

Never      Almost Never      Sometimes      Often      Usually

(b) How does the situation today compare with the situation when you became an appellate judge?

Much Worse      Worse      No Change      Better      Much Better

5. (a) How frequently do you feel that you do not have enough time to prepare adequately for oral argument?

Never      Almost Never      Sometimes      Often      Usually

(b) How does the situation today compare with the situation when you became an appellate judge?

Much Worse      Worse      No Change      Better      Much better

6. (a) Do you feel that caseload pressures have an adverse effect on how you work?

Never      Almost Never      Sometimes      Often      Usually

(b) How does the situation today compare with the situation when you became an appellate judge?

Much Worse      Worse      No Change      Better      Much Better



PART III: Court Size.

Court size refers to the number of judges in active service on the court.

1. How do you like your court's present size?

\_\_\_\_\_ It should be smaller  
\_\_\_\_\_ About right, and I would resist any increase  
\_\_\_\_\_ About right, but I would have no objection  
\_\_\_\_\_ to a larger court  
\_\_\_\_\_ Too small

2. Has the size of your court changed since you have been a judge?

\_\_\_\_\_ Yes  
\_\_\_\_\_ No

3. What do you regard as the ideal size of a federal court of appeals?

\_\_\_\_\_ 5-7 judges  
\_\_\_\_\_ 8-10  
\_\_\_\_\_ 10-15  
\_\_\_\_\_ 15-20  
\_\_\_\_\_ Over 20

4. What do you regard as the outer limit upon the size of a federal court of appeals if the court is to function properly and effectively?

_____ 7 judges	_____ 30
_____ 9	_____ 35
_____ 12	_____ 40
_____ 15	_____ 45
_____ 20	_____ Unlimited
_____ 25	

5. What do you see as the chief disadvantages of a large circuit?

\_\_\_\_\_ No disadvantages  
\_\_\_\_\_ Lack of collegiality  
\_\_\_\_\_ Lack of openness in decisionmaking among judges  
\_\_\_\_\_ Inconsistencies in the law as pronounced by the  
\_\_\_\_\_ different panels  
\_\_\_\_\_ Difficulty for bench and bar in keeping track  
\_\_\_\_\_ of precedent  
\_\_\_\_\_ Other (specify) \_\_\_\_\_

6. If you could choose between adding judges to your court as the caseload grows and not adding judges (notwithstanding the growth in caseload), what would you do?

☐ I would add judges  
☐ I would resist adding judges even if my own share of the caseload increases significantly  
☐ I would resist adding judges even if the backlog increases

7. Various authorities have estimated that federal appellate judges can effectively handle 225-255 decisions on the merits annually each (either as writing judge or panel member). In your opinion are such figures:

☐ Too high  
☐ Too low  
☐ About right

8. In your view, what number of decisions on the merits would be intolerably high?

decisions on the merits annually

9. It now takes about 10 months, on the average, between the filing of a notice of appeal and the disposition. How long a period would you regard as intolerable?

months

10. If your answer to 6 is to resist adding new judges, would you wish additional staff or other methods to enable the same number of judges to handle the increased caseload? (You may indicate several)

☐ No new methods or staff would likely be needed  
☐ Add staff attorneys/law clerks  
☐ Further reduce writing opinions  
☐ Further reduce oral argument  
☐ Provide relief on motions  
☐ Provide relief on administration  
☐ Other (specify) \_\_\_\_\_

11. My court has en banc hearings:

☐ Too often  
☐ About as often as necessary  
☐ Not often enough

12. How do you react to the concept of a small en banc panel (i.e., less than whole court)?

☐ I would prefer such a panel  
☐ I would oppose such a panel  
☐ I am indifferent

13. If caseload increases, would you favor eliminating appeal as of right, and accepting appeals only by leave of court?

☐ Yes  
☐ No

14. I think that the addition of more specialized courts would be:

☐ Very desirable  
☐ Desirable  
☐ Of no great importance either way  
☐ Undesirable  
☐ Very undesirable

15. If you favor more specialized courts what areas would be most appropriate (Check all that apply):

☐ Social Security  
☐ Tax  
☐ Administrative (other than Social Security)  
☐ Other (specify) \_\_\_\_\_

#### PART IV: Methods (optional)

We recognize that some of these questions may, to some respondents, seem intrusive. Feel free to skip any that you do not wish to answer.

IN THE FOLLOWING SECTION PLEASE CHECK ALL THAT APPLY

#### 1. Pre-Argument Preparation

##### a. Time:

☐ I have sufficient time to prepare for oral argument  
☐ I do not have sufficient time to prepare for oral argument



b. Bench memorandum:

\_\_\_\_\_ I always have a bench memorandum prepared  
\_\_\_\_\_ I sometimes have a bench memorandum prepared  
\_\_\_\_\_ I rarely or never have a bench memorandum prepared

c. In my court the opinion writing judge is assigned prior to oral argument:

\_\_\_\_\_ often  
\_\_\_\_\_ sometimes  
\_\_\_\_\_ rarely  
\_\_\_\_\_ never

2. Oral Argument

a. In my court oral argument times are often:

\_\_\_\_\_ too short  
\_\_\_\_\_ about right  
\_\_\_\_\_ too long

b. I find oral argument:

\_\_\_\_\_ very helpful  
\_\_\_\_\_ often helpful  
\_\_\_\_\_ rarely helpful

c. My mind is changed by oral argument:

\_\_\_\_\_ often  
\_\_\_\_\_ sometimes  
\_\_\_\_\_ rarely  
\_\_\_\_\_ never

3. Post-Argument

a. In cases in which I am the writing judge:

\_\_\_\_\_ I prepare the first draft in all cases  
\_\_\_\_\_ I prepare the first draft in some cases  
\_\_\_\_\_ I never prepare the first draft

b. I feel that I have sufficient time for the drafting of opinions:

\_\_\_\_\_ Always  
\_\_\_\_\_ Often  
\_\_\_\_\_ Almost never  
\_\_\_\_\_ Never

c. In cases where I am not the writing judge:

- ☐ I spend more time than I used to
- ☐ I spend about the same time as I used to
- ☐ I spend less time than I used to
- ☐ I spend much less time than I used to

d. In non-argued cases:

- ☐ I rely on the staff draft opinion greatly
- ☐ I almost always go through the record and law thoroughly myself
- ☐ I sometimes go through the record and law thoroughly myself
- ☐ My law clerks usually go through the record and law for me

#### PART V: Overall Impressions

1. The current workload is:

- ☐ Overwhelming
- ☐ Heavy, but about what I was used to before I became a judge
- ☐ Busy, but not burdensome
- ☐ Fairly relaxed
- ☐ No problem

2. The job is:

- ☐ More satisfying than when I first came on
- ☐ Less satisfying than when I first came on
- ☐ About as satisfying as when I first came on

3. If I were offered this position again:

- ☐ I would jump at the opportunity
- ☐ I would give the matter careful thought
- ☐ I would decline the offer

4. I feel that the different panels in our circuit follow circuit precedent.

- ☐ Always
- ☐ Usually
- ☐ Less often than they should

5. I feel that the opinions of our circuit are:

- ☐ Consistent with each other
- ☐ Fairly consistent
- ☐ Less consistent than they should be to provide a reliable guide to lawyers and lower courts.

6. Practices followed by my court which are helpful:

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7. Practices followed by my court which are bothersome and unnecessary

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Philadelphia, PA 19106-1722

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Congressman Carlos J. Moorhead  
Diana Gribbon Motz  
Judge Richard A. Posner

## SUMMARY OF RESPONSES

### TO THE SURVEY OF DISTRICT COURT JUDGES

(Excluding chief judges)

365 Responses from 446 (82% response rate)<sup>1</sup>

#### PART I

When were you appointed to your PRESENT position:

	83-later	78-82	73-77	68-72	68<	Total
	169	152	26	11	5	363

Size of court on which you currently serve:

	83-later	78-82	73-77	68-72	68<	Total
1-3 judgeships	24	15	1	2	1	43
4-7 judgeships	58	50	5	2	2	117
8 or more judgeships	87	87	20	7	2	203

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1. Compiled by Fernando A. Gallard, October 12, 1989.

PART II: Below are some statements about possible effects of caseload pressures on how you do your work. Please select the most appropriate point on the range for each question.

1. How frequently are you forced to rely on your law clerks to do some things that you believe you should do yourself?

	83-later	78-82	73-77	68-72	68<	Total
Never	12	9	0	1	1	23
Almost Never	30	25	5	2	1	63
Sometimes	64	65	15	3	2	149
Often	56	48	5	4	1	114
Usually	7	5	1	1	0	14

How does the situation today compare with the situation when you became a District Judge?

	83-later	78-82	73-77	68-72	68<	Total
Much Worse	5	19	3	4	0	31
Worse	34	60	11	4	1	110
No Change	113	52	9	2	4	180
Better	15	18	2	1	0	36
Much Better	1	3	1	0	0	5

2. Do you feel that you have sufficient time to master the relevant issues in your cases prior to pretrial and trial?

	83-later	78-82	73-77	68-72	68<	Total
Never	0	0	0	0	0	0
Almost Never	14	17	3	1	0	35
Sometimes	48	35	6	2	0	91
Often	42	39	8	5	1	95
Usually	65	61	9	3	4	142

How does the situation today compare with the situation when you became a District Judge?

	83-later	78-82	73-77	68-72	68<	Total
Much Worse	2	16	2	2	1	23
Worse	37	48	11	4	2	102
No Change	111	56	12	3	2	184
Better	17	29	1	2	0	49
Much Better	1	3	0	0	0	4

3. Generally, do you feel that you are able to stay as informed as you should be of changes in the law announced by your court of appeals and the Supreme Court?

	83-later	78-82	73-77	68-72	68<	Total
Never	0	0	0	1	0	1
Almost Never	20	18	2	2	0	42
Sometimes	54	44	5	3	2	108
Often	44	37	9	2	0	92
Usually	51	53	10	3	3	120

How does the situation today compare with the situation when you became a District Judge?

	83-later	78-82	73-77	68-72	68<	Total
Much Worse	3	16	1	3	1	24
Worse	39	48	11	3	2	103
No Change	113	68	12	3	2	198
Better	9	19	1	2	0	31
Much Better	3	1	1	0	0	5

4. With respect to thorny procedural issues at trial, do you feel you have sufficient time to study them before ruling?

	83-later	78-82	73-77	68-72	68<	Total
Never	0	1	0	0	0	1
Almost Never	18	23	4	2	0	47
Sometimes	56	54	6	2	3	121
Often	40	28	6	3	0	77
Usually	55	46	10	4	2	117

How does the situation today compare with the situation when you became a District Judge?

	83-later	78-82	73-77	68-72	68<	Total
Much Worse	1	9	1	2	1	14
Worse	26	43	10	3	1	83
No Change	128	81	14	4	3	230
Better	12	17	1	2	0	32
Much Better	1	2	0	0	0	3



5. Do you feel that caseload pressures have an adverse effect on how you do your work?

	83-later	78-82	73-77	68-72	68<	Total
Never	5	5	3	0	0	13
Almost Never	20	16	5	1	1	43
Sometimes	68	53	12	6	1	140
Often	56	58	5	2	2	123
Usually	20	20	1	2	1	44

How does the situation today compare with the situation when you became a District Judge?

	83-later	78-82	73-77	68-72	68<	Total
Much Worse	5	20	2	2	1	30
Worse	44	57	13	7	2	123
No Change	103	51	9	1	2	166
Better	15	21	1	1	0	38
Much Better	1	3	1	0	0	5

PART III: This section concerns the impact of the Sentencing Reform Act. Some questions ask for comparisons of conditions before and after the Sentencing Guidelines took effect. Your answers should compare the one-year period preceding the guidelines to your experience since you began to apply the guidelines.

7. Approximately how many defendants have you sentenced under the Sentencing Guidelines?

0	4
1-5	16
6-16	108
16-25	94
over 25	137

8. Under Sentencing Guidelines, the time necessary for your sentencing hearings has generally:

Decreased by 50-100%	0
Decreased by 1-49%	6
Not Changed	30
Increased by 1-24%	121
Increased by 25-49%	94
Increased by 50-100%	107

9. Under the Sentencing Guidelines, the time necessary for you to conduct a hearing when a defendant offers a guilty plea has generally:

Decreased by 50-100%	0
Decreased by 1-49%	0
Not Changed	93
Increased by 1-24%	170
Increased by 25-49%	63
Increased by 50-100%	31

10. How does the percentage of guilty pleas in your current criminal caseload compare to the year preceding your first application of the Sentencing Guidelines?

Higher by 50-100%	2
Higher by 1-49%	16
Unchanged	149
Lower by 1-24%	111
Lower by 25-49%	42
Lower by 50-100%	12

11. What effect have the Sentencing Guidelines had on the availability of concessions that may be provided to induce a defendant to plead guilty?

Greatly Decreased	70
Decreased	163
Not Changed	58
Increased	28
Greatly Increased	5

12. How great an impact have the Sentencing Guidelines had upon your workload?

Greatly Reduced	0
Reduced	3
No Impact	45
Increased	242
Greatly Increased	67

13. Given the goals of eliminating disparity between defendants and making sentencing more rational, the additional procedures associated with the Sentencing Guidelines are no more burdensome than needed.

Disagree Strongly	75
Disagree	115
No Opinion	38
Agree	115
Agree Strongly	14

14. How well qualified are the probation officers you have worked with to perform their new functions under the sentencing guidelines?

All Are Qualified	113
Most Are Qualified	184
Many Are Qualified	43
Few Are Qualified	10
None Are Qualified	2
No Basis for Answer	5

15. The Sentencing Guidelines offer sufficient flexibility to permit you to give an appropriate sentence in each case.

Disagree Strongly	103
Disagree	156
No Opinion	17
Agree	79
Agree Strongly	4

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Philadelphia, PA 19106-1722

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Director

Telephone: 215-597-3320  
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Diana Gribbon Motz  
Judge Richard A. Posner

## SURVEY OF DISTRICT COURT JUDGES

Please complete the following questionnaire and return it in the envelope provided. We would appreciate its return by August 7, 1989.

### PART I

When were you appointed to your PRESENT position:

_____ 1983 or later	_____ 1968-1972
_____ 1978-1982	_____ before 1968
_____ 1973-1977	

Size of court on which you currently serve:

_____ 1-3 judgeships
_____ 4-7 judgeships
_____ 8 or more judgeships

PART II: Below are some statements about possible effects of caseload pressures on how you do your work. Please select the most appropriate point on the range for each question.

1. How frequently are you forced to rely on your law clerks to do some things that you believe you should do yourself?

1	2	3	4	5
Never	Almost Never	Sometimes	Often	Usually

How does the situation today compare with the situation when you became a District Judge?

1	2	3	4	5
Much Worse	Worse	No change	Better	Much better

2. Do you feel that you have sufficient time to master the relevant issues in your cases prior to pretrial and trial?

1	2	3	4	5
Never	Almost Never	Sometimes	Often	Usually

How does the situation today compare with the situation when you became a District Judge?

1	2	3	4	5
Much Worse	Worse	No change	Better	Much better

3. Generally, do you feel that you are able to stay as informed as you should be of changes in the law announced by your court of appeals and the Supreme Court?

1	2	3	4	5
Never	Almost Never	Sometimes	Often	Usually

How does the situation today compare with the situation when you became a District Judge?

1	2	3	4	5
Much Worse	Worse	No change	Better	Much better

4. With respect to thorny procedural issues at trial, do you feel you have sufficient time to study them before ruling?

1	2	3	4	5
Never	Almost Never	Sometimes	Often	Usually

How does the situation today compare with the situation when you became a District Judge?

1	2	3	4	5
Much Worse	Worse	No change	Better	Much better

5. Do you feel that caseload pressures have an adverse effect on how you do your work?

1	2	3	4	5
Never	Almost Never	Sometimes	Often	Usually

How does the situation today compare with the situation when you became a District Judge?

1	2	3	4	5
Much Worse	Worse	No change	Better	Much better

6. Please provide any additional information concerning the affects -- if any -- of caseload pressure on how you do your work: have caseload pressures required you to change your work habits? If so, how?

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PART III: This section concerns the impact of the Sentencing Reform Act. Some questions ask for comparisons of conditions before and after the Sentencing Guidelines took effect. Your answers should compare the one-year period preceding the guidelines to your experience since you began to apply the guidelines.

7. Approximately how many defendants have you sentenced under the Sentencing Guidelines?

\_\_\_ 0    \_\_\_ 1-5    \_\_\_ 6-16    \_\_\_ 16-25    \_\_\_ over 25

8. Under the Sentencing Guidelines, the time necessary for your sentencing hearings has generally:

1	2	3	4	5	6
Decreased	Decreased	Not changed	Increased	Increased	Increased
by 50-100%	by 1-49%		by 1-24%	by 25-49%	by 50-100%

9. Under the Sentencing Guidelines, the time necessary for you to conduct a hearing when a defendant offers a guilty plea has generally:

1	2	3	4	5	6
Decreased	Decreased	Not changed	Increased	Increased	Increased
by 50-100%	by 1-49%		by 1-24%	by 25-49%	by 50-100%

10. How does the percentage of guilty pleas in your current criminal caseload compare to the year preceding your first application of the Sentencing Guidelines?

1	2	3	4	5	6
50-100%	1-49%	Unchanged	1-24%	25-49%	50-100%
higher	higher		lower	lower	lower

11. What effect have the Sentencing Guidelines had on the availability of concessions that may be provided to induce a defendant to plead guilty?

1	2	3	4	5
Greatly	Decreased	Not changed	Increased	Greatly
Decreased				Increased

12. How great an impact have the Sentencing Guidelines had upon your workload?

1	2	3	4	5
Greatly Reduced	Reduced	No impact	Increased	Greatly Increased

13. Given the goals of eliminating disparity between defendants and making sentencing more rational, the additional procedures associated with the Sentencing Guidelines are no more burdensome than needed.

1	2	3	4	5
Disagree Strongly	Disagree	No opinion	Agree	Agree Strongly

14. How well qualified are the probation officers you have worked with to perform their new functions under the sentencing guidelines?

1	2	3	4	5	6
All are qualified	Most are qualified	Many are qualified	Few are qualified	None are qualified	No basis for answer

15. The Sentencing Guidelines offer sufficient flexibility to permit you to give an appropriate sentence in each case.

1	2	3	4	5
Disagree Strongly	Disagree	No opinion	Agree	Agree Strongly

16. Please provide any additional comments about the effects of the Sentencing Guidelines on the workload of the federal courts. If you need more space, use the back of this sheet.

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# Federal Courts Study Committee

22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, PA 19106-1722

Judge Joseph F. Weis, Jr.  
Chairman

William K. Slate, II  
Director

Telephone: 215-597-3320  
Facsimile: 215-597-3350

J. Vincent Aprile, II  
Judge Jose A. Cabranes  
Chief Justice Keith M. Callow  
Chief Judge Levin H. Campbell  
Edward S.G. Dennis, Jr.  
Senator Charles E. Grassley  
Morris Harrell  
Senator Howell Heflin  
Congressman Robert W. Kastenmeier  
Judge Judith N. Keep  
Professor Rex E. Lee  
Congressman Carlos J. Moorhead  
Diana Gribbon Motz  
Judge Richard A. Posner

## CHAIRMAN'S PROGRESS REPORT

July 31, 1989

### Preamble

This Chairman's progress report is offered to apprise the numerous individuals who have contributed to the commencement of the Committee's work, and all persons interested in its directions, of the progress made during the first seven months of the Committee's existence. It is our wish that those reading this report will favor us with their observations and recommendations.

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FEDERAL COURTS STUDY COMMITTEE  
Chairman's Progress Report  
July 31, 1989

Section A.      Creation of the Committee

The Federal Courts Study Committee was established by the Federal Courts Study Act, Title 1 of the Judicial Improvements and Access to Justice Act (P.L. 100-702) in November of 1988. The Committee was given fifteen months to examine problems facing the federal courts and develop the first ever long range plan for the future of the Federal Judiciary. The Committee's findings will be submitted to the President, Chief Justice, the Congress, the Judicial Conference of the United States, the Conference of Chief Justices, and the State Justice Institute. The Committee was established on January 1, 1989, and will file its report on April 2, 1990.

This Committee is not the first group commissioned either by Congress or the Supreme Court to study various aspects of the federal judicial system - but none has been given so broad a mandate. Others have been limited to studying the Supreme Court's workload or the functions of the appellate courts. The Federal Courts Study Committee's agenda embraces all phases of the federal court system, its role, its workload, its structure, and its relationship with the state courts.

The fifteen members of the Committee were appointed by Chief Justice William H. Rehnquist and are "representative of the various interests, needs and concerns which may be affected by the jurisdiction of the Federal Courts" as required by Section 103(b) of the Act. The membership includes ranking members of the House and Senate Judiciary Committees, practicing attorneys, federal judges and a state court chief justice. The legislation also provided a modest budget and staff to assist the Committee.

Section B.      Organization of the Committee

In order to accomplish the work of examining the many issues before it, the full Committee subdivided itself into three working subcommittees under broad topical headings.

The Role and Relationships Subcommittee is focusing on the federal courts relationship with state courts, administrative agencies, and Article I courts. It is also seeking to define the basic role of the federal courts in America today and in the future. This subcommittee is also examining interaction between the judicial and legislative branches of government. The

Structure Subcommittee is looking at the administration and management of the system, the way cases flow between the several tiers, the organization of the courts of appeals and major personnel issues. The Workload Subcommittee is concerned with such matters as civil and criminal caseload, alternative dispute resolution, complex litigation, science and technology evidence, and issues related to bias.

There is an unavoidable overlap of subject matter on a number of issues before the several subcommittees.

Each subcommittee is supported by reporters and advisory panel members. In addition, associate reporters have been appointed where their expertise in discrete matters is beneficial to the Committee. The reporters are from academia, private practice and government service. See App. 3. Advisors have been appointed from a broad spectrum of experts to enhance the Committee's deliberations. See App. 4.

#### Section C. Process and Public Access

From its inception, the Committee has sought advice in its consideration of the issues from a broad spectrum of individuals and groups. One of the Committee's first acts was to survey all members of the federal judiciary, senior court personnel, the leadership of the Administrative Office of the United States Courts and the Federal Judicial Center as to their perceptions of the major problems facing the federal courts. Others individually contacted included citizen groups, bar associations, research organizations, academics, civil rights groups, labor unions, law school deans and judicial improvement organizations. An effort has also been made to secure comments from the general public through the use of press releases, articles and the electronic media. Literally hundreds of written comments have been reviewed.

Four public hearings were conducted across the nation in Atlanta, Boston, Chicago and Pasadena and resulted in thoughtful testimony from 78 quite diverse witnesses. Each meeting was publicized extensively and the Committee was pleased to be able to hear from everyone who requested the opportunity to make a presentation. Cable television coverage of the Chicago meeting precipitated additional inquiries and comments from individuals previously unaware of the Committee's work.

The full Committee has met three times and each meeting has been open to the general public. When the Committee met for the first time, on February 3, 1989, organizational issues were addressed and the general approach to the study was discussed. The public hearings followed. On April 10, 1989, the Committee



considered the vast array of public comments and developed a consensus on the issues to be addressed. The cable television broadcast of this meeting brought about additional comments from the public. The June 5, 1989 meeting of the Committee included a report from subcommittees on refinements to the issues to be addressed and comments from advisory panels.

#### Section D. Format of Final Report

At its second meeting the Committee tentatively agreed on a proposal advanced by its legislative members of producing a two-tiered format for the final report. The first section would include recommendations capable of immediate implementation. Such recommendations will refine existing practices and procedures. Some recommendations may require legislative enactments for which it is hoped ready support will exist.

The second part of the report will encompass longer-range issues which, for a variety of reasons, will require more time before dispositive action occurs. These may or may not be controversial or experimental. In many instances they will require further study or empirical data collection. The purpose of this section would be to identify the issues, suggest potential solutions where possible, and propose specific research with the expectation that appropriate action would be initiated at a later time. This includes major structural changes and possibly select workload realignments.

The report will include mechanisms for implementation such as draft legislation for the Legislative Branch, draft rules or regulations for the Judicial and Executive Branches, and other work products as necessary.

While it became clear early that much work will be required after the statutory life of the Committee ends, there are no present plans to request an extension of time for this Committee to pursue the agenda being developed. However, many commentators and experts have advised the Committee to focus on the mechanism or forum for the follow up efforts required. Implicit in this thinking is the realization that continued long range planning is essential to the presence of an effective and responsive judicial branch, just as enhanced communication among the three branches of government is similarly critical.

#### Section E. Issues to be Addressed

1. Limitations of time do not permit new research or extensive empirical data collection during the life of the Committee.



Rather, substantial reliance is being placed on extant studies and other available information which the Committee is analyzing and debating. One exception is the forecasting inherent in looking ahead twenty-five years in developing a long-range plan.

## **2. Specific Issues Being Addressed by the Three Subcommittees**

### **ROLE AND RELATIONS SUBCOMMITTEE**

- a. Historical, empirical, and theoretical background: development, current status, and decision making role of the federal courts.
- b. Federal court administration of federal law: areas such as possibly clarifying case-law definitions of original federal question jurisdiction; requiring exhaustion of state administrative remedies that meet certain standards as a prerequisite to filing under 42 U.S.C. §1983, as is contemplated for state prison administrative remedies by 42 U.S.C. §1997; allocation of FEHA and Jones Act cases among federal and state courts or administrative workers' compensation systems; the Federal Tort Claims Act; possible creation of more specialized federal courts.
- c. Relations among federal courts: transfer mechanisms, law applicable following transfer.
- d. Relationship with administrative agencies and Article I courts: initial forum for federal tax claims; administrative and judicial review of Social Security disability claims; bankruptcy jurisdiction, procedure, and appeals; judicial review of agency adjudication and in other areas.
- e. Relation to state courts: diversity jurisdiction reform or abolition; removal; anti-injunction act; abstention doctrines; pendent and ancillary jurisdiction; habeas corpus fact-finding review.
- f. Relations with Congress: recommendation for creation of a permanent federal law revision commission; practices concerning legislative history; principles of statutory construction, Congressional allocation of cases between federal and state courts as well as administrative agencies.

## STRUCTURE SUBCOMMITTEE

- g. Appellate court structure: inter-circuit conflict, its significance, and mechanisms for dealing with it; intra-circuit disparity; alternate processing methods, such as district court review panels for fact-dependent appeals; circuit or divisional boundaries.
- h. District court structure: selection, tenure, and role of Chief Judges; role of Clerk, possible use of district court executives; district boundaries; places of holding court.
- i. Magistrates: role, selection, and tenure.
- j. Judicial Conference and Circuit Councils: adequacy of recently revised structure of Judicial Conference; structure and function of Circuit Councils and Circuit Executives; effectiveness of judicial discipline mechanisms.
- k. Administrative Office and Federal Judicial Center: functioning of Administrative Office and FJC; judicial budgeting process; relations with Congress; space and facilities planning.
- l. Judicial vacancies: filling vacancies, process of creating new judgeships, use of senior judges.

## WORKLOAD SUBCOMMITTEE

- m. Incentives and disincentives in litigation: attorney fee awards, encouragement of settlement, possibility of user fees.
- n. Alternative dispute resolution: experience with various approaches, such as mediation, early neutral evaluation, court-annexed "arbitration," mini-trials, summary (advisory) jury trials, "rent-a-judge"; types of cases for which ADR seems most or least suitable; possible concerns with ADR, such as cost and preservation of jury trials.
- o. Complex litigation: potential need for additional provisions to deal with multiparty, multiforum disputes such as often arise from mass disasters or product liability litigation; efficiency and litigant satisfaction in consolidated as opposed to individual litigation.
- p. Science and technology: use of scientific and technological information in adjudication; possible use

of impartial experts or screening of expert witnesses; use of technology to improve efficiency in handling court workloads.

- q. Statutory revisions to eliminate unnecessary litigation: possible requirement of "judicial impact statements" in legislation; areas of law in which clarification might reduce litigation, such as federal statutes of limitation, explicit statements on availability of private causes of action, and troublesome provisions in Judicial Code.
- r. Federal criminal jurisdiction: aspects of the federal Criminal Code in which exercise of discretion not to prosecute, in favor of state proceedings, may suggest the absence of strong present federal interest and the possibility of eliminating or narrowing federal coverage; procedural improvements for increasingly complex federal criminal cases; possible trial of some federal crimes in state courts.
- s. Mechanisms to assure absence of gender and race bias in federal administration of justice, as in jury selection and treatment of parties, counsel, and witnesses.
- t. Possible transfer, certification, or inter-system review to aid in federal court adjudication of state law issues and state court adjudication of federal law issues.

**Section F.      Summary and Statement of Work to be Accomplished**

To date the Committee has concentrated its efforts on collecting the issues to be studied, problems facing the federal courts and implementing a methodology for accomplishing the work. We have relied heavily on the observations and suggestions of those who labor daily in the federal court system, as well as on those who receive its product - justice. In the remaining eight months we will study the problems before us as well as others which it is agreed should be added, and fashion recommendations for action, or where appropriate, suggest further inquiry.

Our Committee plan calls for a draft report to be mailed to interested parties by the end of December, followed by a comment period of approximately five weeks. A second round of public hearings in eight cities is contemplated during January 1990.

**APPENDIX 1**  
**Chairman's Progress Report**

**TITLE 1 - FEDERAL COURTS STUDY COMMITTEE**  
**Judicial Improvements and Access to Justice Act**  
**P.L. 100-702**

**SEC. 101. SHORT TITLE.**

This title may be cited as the "Federal Courts Study Act".

**SEC. 102. ESTABLISHMENT AND PURPOSES.**

(a) **ESTABLISHMENT.** - There is hereby established within the Judicial Conference of the United States, a Federal Courts Study Committee on the future of the Federal Judiciary (hereafter referred to as the "Committee").

(b) **PURPOSES.** - The purposes of the Committee are to -

- (1) examine problems and issues currently facing the courts of the United States;
- (2) develop a long-range plan for the future of the Federal Judiciary, including assessments involving --
  - (A) alternative methods of dispute resolution;
  - (B) the structure and administration of the Federal court system;
  - (C) methods of resolving intracircuit and intercircuit conflicts in the courts of appeals; and
  - (D) the types of disputes resolved by the Federal courts; and
- (3) report to the Judicial Conference of the United States, the President, the Congress, the Conference of Chief Justices, and the State Justice Institute on the revisions, if any, in the laws of the United States which the Committee, based on its study and evaluation, deems advisable.

**SEC. 103. MEMBERSHIP OF THE COMMITTEE.**

(a) **APPOINTMENTS.** - The Committee shall be composed of fifteen members to be appointed by the Chief Justice of the United States, within ten days after the effective date of this title.

(b) **SELECTION.** - The membership of the Committee shall be selected in such a manner as to be representative of the various interests, needs and concerns which may be affected by the jurisdiction of the Federal courts. The Chief Justice

shall designate one of the members of the Committee to serve as Chairman.

(c) TERM OF OFFICE. - The Committee members shall serve at the pleasure of the Chief Justice.

(d) RULES OF PROCEDURE. - Rules of procedure shall be promulgated by vote of a majority of the Committee.

#### SEC. 104. POWERS OF THE COMMITTEE.

(a) HEARINGS. - The Committee or, on the authorization of the Committee, any subcommittee thereof may, for the purpose of carrying out its functions and duties, hold such hearings and sit and act at such times and places, as the Committee or any such subcommittee may deem advisable.

(b) INFORMATION AND ASSISTANCE. - The Administrative Office of the United States Courts, the Federal Judicial Center, and each department, agency, and instrumentality of the executive branch of the Government, including the National Institute of Justice and independent agencies, shall furnish to the Committee, upon request made by the Chairman, such information and assistance as the Committee may reasonably deem necessary to carry out its functions under this title, consistent with other applicable provisions of law governing the release of such information.

(c) PERSONNEL. - (1) Subject to such rules and regulations as may be adopted by the Committee, the Director of the Administrative office shall furnish to the Committee necessary staff and technical assistance in response to needs specified. (2) Section 5108(c)(1) of title 5, United States Code, is amended by striking out "15" and inserting in lieu thereof "17".

(d) ADVISORY PANELS. - The Committee is authorized, for the purpose of carrying out its functions and duties pursuant to the provisions of this title, to establish advisory panels consisting of Committee members or members of the public. Such panels shall be established to provide expertise and assistance in specific areas, as the Committee deems necessary.

#### SEC. 105. FUNCTIONS AND DUTIES.

The Committee shall -

(1) make a complete study of the courts of the United States and of the several States and transmit a report to the President, the Chief Justice of the United States, the Congress, the Judicial Conference of the United States, the



Conference of Chief Justices, and the State Justice Institute on such study, within fifteen months after the effective date of this title;

(2) recommend revisions to be made to laws of the United States as the Committee, on the basis of such study, deems advisable;

(3) develop a long-range plan for the judicial system; and

(4) make such other recommendations and conclusions it deems advisable.

#### SEC. 106. COMPENSATION OF MEMBERS.

(a) EMPLOYEES OF THE GOVERNMENT. - A member of the Committee who is an officer or full-time employee of the United States shall receive no additional compensation for his or her services, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Committee, not to exceed the maximum amounts authorized under section 456 of title 28.

(b) PRIVATE SECTOR. - A member of the Committee who is from the private sector shall receive \$200 per diem for each day (including travel time) during which he or she is engaged in the actual performance of duties vested in the Committee, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties, not to exceed the maximum amounts authorized under section 456 of title 28.

#### SEC. 107. EXPIRATION OF THE COMMITTEE.

The Committee shall cease to exist on the date 60 days after it transmits the report pursuant to section 105.

#### SEC. 108. AUTHORIZATION OF APPROPRIATIONS.

To carry out the purposes of this title there are authorized to be appropriated \$300,000 for each of the fiscal years 1989 and 1990.

#### SEC. 109. EFFECTIVE DATE.

This title shall become effective on January 1, 1989.



APPENDIX 2  
Chairman's Progress Report

COMMITTEE MEMBERSHIP:

J. Vincent Aprile, II is General Counsel of the Department of Public Advocacy for the State of Kentucky.

Jose A. Cabranes is United States District Judge for the District of Connecticut.

Keith M. Callow is Chief Justice of the Supreme Court of Washington.

Levin H. Campbell of Massachusetts is Chief Judge of the United States Court of Appeals for the First Circuit.

Edward S.G. Dennis, Jr. of Washington, D.C. is Assistant Attorney General for the Criminal Division of the United States Department of Justice.

Charles E. Grassley of Iowa is a United States Senator.

Morris Harrell of Texas is in private practice with the law firm of Locke, Purnell, Rain & Harrell.

Howell Heflin of Alabama is a United States Senator.

Robert W. Kastemeier of Wisconsin is a Member of the United States House of Representatives.

Judith N. Keep of California is a United States District Judge.

Rex E. Lee of Utah is President of Brigham Young University.

Carlos J. Moorhead of California is a Member of the United States House of Representatives.

Diana Gribbon Motz of Maryland is in private practice with the law firm of Frank, Bernstein, Conway & Goldman.

Richard A. Posner of Illinois is a United States Circuit Judge.

Joseph F. Weis, Jr. of Pennsylvania is a senior United States Circuit Judge.

APPENDIX 3  
Chairman's Progress Report

COMMITTEE STAFF:

William K. Slate, II of Pennsylvania is the Director.

Steven G. Gallagher of Pennsylvania is Counsel.

COMMITTEE REPORTERS:

Diana G. Culp of Washington, D.C. is in private practice with the law firm of Covington & Burling.

Denis J. Hauptly of Washington, D.C. is Special Master to the United States Court of Claims. He is assisted by Professor Thomas E. Baker of Texas Tech University School of Law.

Larry B. Kramer of Illinois is professor of Law at the University of Chicago. He is assisted by Russell Wheeler, Director of the Special Educational Services Division of the Federal Judicial Center.

Thomas D. Rowe of North Carolina is Professor of Law at Duke University. Associate Reporters for the Workload Subcommittee are Professor Sara Sun Beale of Duke University Law School and Professor Richard Marcus of the Hastings College of Law.

CONGRESSIONAL STAFF LIAISONS:

Samuel Gerdano of Washington, D.C. serves as Minority Chief Counsel of the Subcommittee on Courts and Administrative Practice of the United States Senate.

Karen Kremer of Washington, D.C. serves as Chief Counsel and Staff Director of the Subcommittee on Courts and Administrative Practice of the United States Senate.

Michael J. Remington of Washington, D.C. serves as Chief Counsel of the Subcommittee on Courts of the United States House of Representatives.

Joseph Wolfe of Washington, D.C. serves as Minority Counsel of the Judiciary Committee of the United States House of Representatives.

Thomas E. Mooney of Washington, D.C. serves as Minority Counsel of the Subcommittee on Courts, House Judiciary Committee.

APPENDIX 4  
Chairman's Progress Report

ADVISORY PANEL MEMBERS:

Role and Relationships Subcommittee

Prof. John J. Donohue	Northwestern Univ. School of Law
Andrew Frey, Esq.	Washington, D.C.
Kenneth Geller, Esq.	Washington, D.C.
Judge Robert E. Ginsberg	U.S. Bankr. Court (N.D. Ill.)
Judge Patrick E. Higginbotham	U.S. Court of Appeals (5th Cir.)
Prof. A. Leo Levin	Univ. Pennsylvania Law School
Prof. Jerry L. Mashaw	Yale Law School
Prof. Daniel Meltzer	Harvard Law School
Alan Morrison, Esq.	Washington, D.C.
Judge Jon O. Newman	U.S. Court of Appeals (2d Cir.)
Prof. Judith Resnick	Yale Law School

Workload Subcommittee

Robert S. Banks, Esq.	New York, New York
Robert N. Chatigny, Esq.	Hartford, Ct.
Prof. Edward H. Cooper	Univ. Michigan Law School
George A. Davidson, Esq.	New York, New York
William B. Eldridge	Washington, D.C.
Prof. E. Donald Elliott	Yale Law School
Linda Finkelstein	Washington, D.C.
Judge Leonard I. Garth	U.S. Court of Appeals (3d Cir.)
Laurence Gold, Esq.	Washington, D.C.
Judge David R. Hansen	U.S. District Court (N.D. Iowa)
Conrad K. Harper, Esq.	New York, New York
Prof. Geoffrey C. Hazard, Jr.	Yale Law School
Judge Ellen Ash Peters	Supreme Court of Connecticut
A. Raymond Randolph, Esq.	Washington, D.C.
Michael J. Remington	U.S. House of Representatives
Prof. Linda J. Silberman	New York University
Ralph S. Tyler, Esq.	Baltimore, MD
Judge J. Clifford Wallace	U.S. Court of Appeals (9th Cir.)

Structure Subcommittee

Judge Charles Clark	U.S. Court of Appeals (5th Cir.)
Prof. Daniel Meador	Univ. of Virginia School of Law
Judge Robert Peckham	U.S. District Court (N.D. Cal.)
Prof. Maurice Rosenberg	Columbia University School of Law

## FEDERAL COURTS STUDY COMMITTEE

### **Tentative Recommendations For Public Comment**

December 22, 1989

The following is a list of tentative recommendations developed by the Federal Courts Study Committee. The Committee was created by Congress to examine problems facing the courts of the United States and to develop the first-ever long range plan for the Federal Judiciary.

This draft is being provided to a broad cross-section of the national community to encourage comments from diverse viewpoints before final proposals are presented in April 1990 to the Chief Justice, the President, the Congress, the Conference of State Chief Justices and the State Justice Institute.

Public hearings on the tentative recommendations are scheduled in the cities listed below. We encourage anyone who wishes to address a hearing in person to contact the Committee office as soon as possible.

Des Moines, Iowa	January 18, 1990
Madison, Wisconsin	January 19, 1990
Dallas, Texas	January 22, 1990
Miami, Florida	January 23, 1990
Salt Lake City, Utah	January 25, 1990
Seattle, Washington	January 26, 1990
San Diego, California	January 29, 1990
New York, New York	January 30, 1990
Washington, D.C.	January 31, 1990

The purpose of these tentative recommendations is to stimulate debate and comment before final resolution of Committee recommendations. Thus, this tentative listing does not reflect unanimity of opinion among Committee members on each and every recommendation.

## **Tentative Recommendations For Public Comment**

### **THE FEDERAL COURTS STUDY COMMITTEE**

December 22, 1989

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Comments should be directed  
by January 31, 1990 to:

Federal Courts Study Committee  
22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, Pennsylvania 19106-1722

(215) 597-3320

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**THE FEDERAL COURTS STUDY COMMITTEE**

Judge Joseph F. Weis, Jr., Chairman

J. Vincent Aprile, II, Esq.  
Judge José A. Cabranes  
Chief Justice Keith M. Callow  
Chief Judge Levin H. Campbell  
Edward S.G. Dennis, Jr., Esq.  
Senator Charles E. Grassley  
Morris Harrell, Esq.

Senator Howell Heflin  
Rep. Robert W. Kastenmeier  
Judge Judith N. Keep  
President Rex E. Lee  
Rep. Carlos J. Moorhead  
Diana Gribbon Motz, Esq.  
Judge Richard A. Posner

---

William K. Slate, II, Director  
Steven G. Gallagher, Counsel  
Elizabeth Manion Bege, Administrative Assistant

**LEGISLATIVE, JUDICIAL & EXECUTIVE BRANCH LIAISONS**

Robert E. Feidler  
Samuel Gerdano  
Charles G. Geyh  
Thomas Mooney

Michael C. Olmsted  
Michael J. Remington  
R. Scott Williams  
Joseph Wolfe

**REPORTERS**

Diana G. Culp  
Denis J. Hauptly

Larry B. Kramer  
Thomas D. Rowe, Jr.

**ASSOCIATE REPORTERS**

Thomas E. Baker  
Sara Sun Beale

Richard L. Marcus  
Russell W. Wheeler

**ASSISTANT REPORTER**

Michael C. Gizzi

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## INTRODUCTION

### Creation of the Committee

The fifteen members of the Federal Courts Study Committee ("Committee") were appointed by Chief Justice William H. Rehnquist to be "representative of the various interests, needs and concerns which may be affected by the jurisdiction of the Federal Courts" as required by Section 103(b) of the Federal Courts Study Act.<sup>1</sup> The participants include members of the Executive, Legislative and Judicial branches, as well as representatives from state governments, academia and private practice.

Before the appointment of the Committee, the need for a sweeping look at the system had been evident for some time. For example, the courts' caseload has been increasing dramatically since the mid-1960s and changing in complexity as well. The Committee's existence reflects the realization that Congress and the courts sense a compelling need for a comprehensive survey of the problems and of a long range plan for the federal judiciary.

The Committee is not the first group commissioned to study the problems confronting the federal judicial system but none has ever been given so broad a mandate. Other groups were instructed to study the Supreme Court's workload or the functions of the appellate courts in particular.<sup>2</sup> This Committee's agenda, however, embraces all phases of the federal court system, its role, its workload, its structure and its relationship with the state courts.<sup>3</sup> Among the many issues studied by the Committee and reported as tentative proposals in the following pages are the structure and administration of the federal court system, alternative methods of dispute resolution, proposed methods of resolving intracircuit and

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1. Title 1 of The Judicial Improvements and Access to Justice Act (P.L. 100-702).

2. See, e.g., Commission on Revision of the Federal Court Appellate System, Structure & Internal Procedure: Recommendation for Change, June 1975 ("The Hruska Commission").

3. The blueprint for this Committee was drawn in Working Paper - Future of the Judiciary, 94 F.R.D. 225 (1981), by Judge J. Clifford Wallace who recommended that a Legislative Commission be constituted to conduct an in-depth study. He recommended that the Commission be established for three to five years, following which its work would be reported.

intercircuit conflicts in the courts of appeals, as well as a survey of the types of disputes that should be resolved by the federal courts.

### **Organization and Structure of the Committee**

In order to accomplish the work of examining the many issues before it, the full Committee subdivided itself into three working subcommittees, each taking upon itself a broad topical heading.

The Subcommittee on the Administration, Management and Structure of the Federal Courts looked at the administration and management of the federal system: the way cases flow between the several tiers, the organization of the courts of appeals, review of administrative actions, and major personnel issues, such as the use of magistrates, court staff and judicial vacancies. The Subcommittee on the Role and Relationships of the Federal Courts focused on the federal courts' relationship with Congress, administrative agencies and the state courts, as well as the role of Article I courts.

The Subcommittee on the Workload of the Federal Courts reviewed such matters as civil and criminal caseload problems, alternative dispute resolution, complex multi-district litigation, and science and technology in the courts.

Naturally, an unavoidable overlap of subject matter on a number of issues arose among the subcommittees, a factor which, we think, contributed to an exchange of ideas.

Each subcommittee was supported by reporters and advisory panel members. The reporters came from academia, private practice and government service. To enhance the Committee's deliberations, advisors were appointed from a broad range of experts. The advisors assisted with the research and provided responses to the Subcommittee's draft recommendations. In addition, associate reporters were appointed where their expertise on specific issues were thought to be beneficial to the Committee.

A professional staff directed the work of the Committee from the U.S. Courthouse in Philadelphia, Pennsylvania.

### **Process and Public Access**

From its inception, the Committee has sought advice from a broad spectrum of individuals and groups. In the first seven months of its existence, the Committee concentrated its

efforts on identifying the problems facing the federal courts. The Committee relied heavily on the observations and suggestions of those who labor daily in the federal court system, as well as on those who are the beneficiaries of its work.

One of the Committee's first acts was to question all members of the federal judiciary, senior court personnel, the leadership of the Administrative Office of the United States Courts and the Federal Judicial Center about the major problems facing the federal courts. Others contacted included citizen groups, bar associations, research organizations, academics, civil rights groups, labor unions, corporations, law school deans and judicial improvement organizations.

Public comment was sought through the use of press releases, articles and the electronic media. Hundreds of written comments submitted by groups and individuals were considered by the Committee.

During public hearings in Atlanta, Boston, Chicago and Pasadena, in the third month of the Committee's existence, testimony was received from seventy-eight diverse witnesses. In some instances, cable television coverage precipitated additional inquiries and comments.

In August, The Chairman's Progress Report was publicly distributed. The Report listed issues to be considered and the process to be employed.

In the remaining months, the Committee considered a variety of issues in preparing recommendations for action, or where appropriate, suggesting further inquiry.

To the extent that the Committee's recommendations result in a transference of work to state courts, such proposals arose not out of a belief that the state courts are in any way inferior or are less important than are the federal courts. Indeed, we reject that proposition. Rather the recommendations reflect the Committee's conclusion that the federal courts are limited in number, finite in scope, and imbued with a narrow mission.

The following compendium of tentative recommendations is being circulated to over 5,000 interested parties followed by a second round of public hearings in nine cities<sup>4</sup> in January, 1990.

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4. Dallas; Des Moines; Madison; Miami; New York; Salt Lake City; Seattle; San Diego; and Washington, D.C.

Although the statutory life of the Committee ends sixty days after transmission of its final Report, some commentators have advised the Committee to plan a follow-up effort.

**The tentative recommendations of the Committee follow.**

More detailed analysis for each tentative recommendation prepared by or for the subcommittees are available upon request of:

Federal Courts Study Committee  
22716 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, Pennsylvania 19106-1722

(215) 597-3320

The purpose of these tentative recommendations is to stimulate debate and comment before final resolution of Committee recommendations. Thus, this tentative listing does not reflect unanimity of opinion among Committee members on each and every recommendation.

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## I. GROWTH OF THE FEDERAL COURTS

- ▶ Although Congress may find it necessary to add judgeships to meet immediate needs,<sup>5</sup> and may continue to find such additions periodically necessary, the Committee sees disadvantages in making the Article III judiciary too large. Accordingly, the Committee recommends that Congress and the Judicial Conference consider alternative means of coping with the federal caseload problem for purposes of long-term planning before routinely adding new judgeships.

In the past, Congress has responded to caseload growth by authorizing additional judgeships. But indefinitely increasing the size of the federal judiciary poses several problems. First, making the federal judiciary larger strains the appointments process and makes it more likely that unqualified candidates will be nominated and approved. Second, a larger judiciary results in more conflicting opinions which, in turn, create uncertainty in the law and encourage still more litigation. Third, as court becomes larger, familiarity and collegiality among judges diminishes, and with it the sense of accountability upon each judge to produce a superior work product. Fourth, since the federal bench is less financially rewarding than the private sector, job satisfaction is an important factor in attracting candidates who are challenged by an intellectually demanding position of public service. That attraction diminishes as the opportunity for individual contribution diminishes.<sup>6</sup> Finally, as the court becomes larger and more bureaucratic, familiarity and collegiality among judges diminishes, and with it the sense of accountability imposed upon each judge to produce an excellent work product.

These problems are not so serious so as to foreclose the option of adding judges when necessary to meet urgent needs. But increasing the size of the judiciary does

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5. For example, we note a dire need for judicial appointments on the appellate level. Equally serious needs also exist in certain district and bankruptcy courts.

6. A related problem is the difficulty in maintaining intracircuit uniformity in large circuits, and intercircuit uniformity if the circuits are divided into smaller ones.

entail significant risks. Prudence suggests that, at least in terms of long-term planning, Congress and the Judicial Conference consider alternative solutions to appointments, such as shifting some types of cases to other tribunals, trimming back jurisdiction in areas where a federal forum is unnecessary or inappropriate, and altering the procedures for handling certain cases.

## II. The Reallocation of Judicial Business

### A. FEDERAL AND STATE COURTS

#### 1. Diversity Jurisdiction

- ▶ Diversity jurisdiction should be reformed to apply only to complex multi-state litigation, interpleader, and suits to which aliens are parties. Suits based solely on diversity of citizenship would not be a basis for federal jurisdiction. As an alternative, suits brought by in-state plaintiffs would not fall within diversity jurisdiction; claims for pain and suffering, punitive damages or attorney's fees would not be included in calculating the amount in controversy; and corporations would be considered citizens of every state in which they are licensed to do business.

Diversity jurisdiction in the federal courts has been a subject of controversy since 1788. In an effort to limit the number of these cases, a requirement of satisfying a minimum amount in controversy has been imposed. The Judiciary Act of 1789 began this tradition by specifying that the amount must exceed \$500. The present jurisdictional floor is \$50,000.

Despite these limitations, the flood of diversity cases into the federal system has continued and, at present, accounts for approximately 25% of the civil case load. The costs of maintaining this aspect of jurisdiction are high. A recent study by the Federal Judicial Center estimates that the judicial resources to adjudicate diversity cases are equivalent to the workload of 193 district judges and 22 courts of appeals judges. Monetary costs are estimated to be \$131 million annually.<sup>7</sup>

Since these cases do not implicate federal law or national policy, but rather questions of state law, the strains that they place on finite judicial resources require a searching look at the scheme of diversity jurisdiction.

Diversity cases account for a disproportionate number of trials in the district courts and thus the volume of filings understates the impact of this type of litigation

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7. Partridge, The Budgetary Impact of Possible Changes in Diversity Jurisdiction (Federal Judicial Center 1988).

on the courts' workload. Moreover, the diversity cases frequently generate complex procedural and jurisdictional problems, making it more time consuming and expensive to process than similar claims in the state courts.

Because federal rulings on issues of state law do not have precedential effect, diversity absorbs judicial efforts on cases that make little contribution to a body of law. Lack of consistency between federal interpretations of state law and subsequent pronouncements by a state's highest court lead to contrary results in similar cases.

Two of the reasons alleged to justify the costs of diversity jurisdiction -- local bias and a superior bench in the federal courts -- on examination fail to meet that burden. There are scant empirical data on the bias issue, and it seems likely that other forms of prejudice are more prevalent today and more likely to influence litigation.

To the extent that there is any validity to the contention that the federal forum is superior to that of the state in some areas, the argument is self-defeating. In essence, it suggests that efforts which could be made to improve the state system are not forthcoming because of the existence of an alternative in the federal courts.

The monetary floor is an explicit recognition that the simple fact of diversity of citizenship standing alone is not an adequate justification for the use of federal court resources. The amount in controversy is an arbitrary, pragmatic attempt to limit the diversion of federal courts from their primary role of litigating federal constitutional and statutory issues. That method, however, takes no cognizance of the unique aspects of federal judicial power which should more properly be the criteria for determining the most effective invocation of diversity jurisdiction.

The Committee proposes that diversity jurisdiction be made available in complex cases involving scattered events or parties and substantial claims by numerous plaintiffs. In cases of this nature, the national reach of federal court jurisdiction would enable a single forum to resolve disputes involving multiple parties from many states. Mass disaster litigation, such as a commercial airline crash, is an obvious example. Suits in which aliens are parties and interpleader also have special characteristics which require their continuation in federal courts.

No such unique considerations, however, exist in the average contract or tort case which is governed by state

law and may readily be litigated in state court. The fortuity that one party to a contract dispute or tort action may reside in another state -- in some instances, no more than a few hundred yards away -- is not an adequate justification for filing in, or removal to, a federal court when similarly situated litigants who lack diversity of citizenship must bring their suits in state courts. The Committee, therefore, recommends that diversity jurisdiction not be provided when the only basis is that the parties are citizens of different states.

If Congress is unwilling to take that action, we recommend, as an alternative, the less effective steps of (1) prohibiting in-state plaintiffs from invoking diversity jurisdiction, (2) considering corporations to be citizens of every state in which they are licensed to do business, and (3) specifying that the jurisdictional floor does not include pain and suffering, punitive damages, mental anguish, attorneys' fees, etc.

As a separate alternative, but also one that could be included within the second series of alternatives, the committee recommends that the jurisdictional amount in controversy necessary to file a diversity case in federal court be raised from \$50,000 to \$75,000, with indexing applied to the new floor amount.

Although diversity cases are, by definition, state law claims and thus properly matters for the state courts, the Committee has not overlooked the fact that state courts in general are also faced with increasing caseloads. Nevertheless, a study commissioned by the National Center for State Courts concludes that, on average, the increase in the number of cases filed per state court general jurisdiction judge would be approximately eleven if diversity jurisdiction were totally abolished.<sup>8</sup>

In this connection, the Committee notes that Congress established the State Justice Institute and appropriated funds for it. Thus there is already in existence a mechanism through which an examination of this subject could be made. If diversity jurisdiction is eliminated, in whole or in part, sufficient funds should be provided by the Congress to the state judiciaries for a reasonable period of time, to permit the state judicial systems to

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8. Flango and Boersema, How Would Proposed Changes in Jurisdiction Affect State Courts, National Center for State Courts (1989).



adjust to the increased workload and absorb the diversity cases which had been handled by the federal systems.

Several committee members are of the view that changes should not be recommended with regard to diversity jurisdiction. Those members point out that congress originally created diversity jurisdiction two hundred (200) years ago to avoid possible discrimination against out-of-state parties by providing a forum free of political influences and entanglements. They believe that a number of recent well-publicized cases unquestionably demonstrate and affirm that diversity jurisdiction is still necessary to guard against this very problem. Whatever the costs of maintaining diversity jurisdiction - and they believe those costs are overstated by the Committee - those costs are not nearly significant enough to justify the abolition of diversity jurisdiction. Accordingly they believe that diversity jurisdiction should not be abolished. Moreover, they believe that the proposed "alternative proposal which would make corporations citizens of every state in which they are licensed to do business, is not a limited alternative at all but would abolish diversity jurisdiction for most corporations, and is thus equally objectionable.

## 2. Complex Litigation

- Congress should (a) amend 28 U.S.C. § 1407(a) to permit consolidated trial as well as pretrial proceedings, and (b) create a special Federal jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major related, multi-party, multiforum litigation.

The past few decades have witnessed a considerable increase in complex litigation involving related claims being pressed concurrently in several federal and state courts. Airplane crash and product liability cases are only two examples. To the extent that such cases can invoke existing federal jurisdiction, current law only partly handles problems of multiplicity: 28 U.S.C. § 1407(a) permits consolidated pretrial proceedings in cases involving common questions of fact.<sup>9</sup> The authorized

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9. 28 U.S.C. §1407(a) provides: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. . . ." (emphasis supplied). Section 1407(g), (continued...)



consolidation is only for pretrial matters (although as a practical matter the cases are often settled or liability questions tried together by consent); and under the statutory requirement of complete diversity, in state law matters many parties cannot take advantage of federal court consolidation because they are citizens of the same state as one of their adversaries.

Therefore, to make fuller consolidation available when it would be desirable, Congress should both broaden § 1407(a) to allow for consolidated trial as well as pretrial proceedings and adopt a new jurisdiction based on minimal, rather than complete, diversity so that parties to a multi-state, multi-party litigation can be included even if they are citizens of the same state. To a considerable extent this jurisdiction would permit more efficient handling of cases that are already partly before the federal courts, so that caseload increases should not be severe. Federal courts could also be given discretion to remand that portion of complex cases that are predominantly in state courts.

Legislating complex litigation raises numerous difficult subsidiary issues, such as choice of law, statutes of limitations, single event or related-matter jurisdiction, removal, possible revision of joinder and class action rules, and remand for trial on damages. Partly because major studies of these questions are currently being conducted by both the American Law Institute and the American Bar Association Commission on Mass Torts, and also because many of the issues are unusually intricate and technical, the Committee confines itself to endorsement of the two principles stated above.<sup>10</sup>

- Guidelines on consolidation and severance should be developed for inclusion in the Manual for Complex Litigation.

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9. (...continued)

amended Sept. 30, 1976, already allows consolidation and transfer "for both pretrial purposes and for trial" of any action brought under Section K of the Clayton Act.

10. See generally American Law Institute, Study of Complex Litigation (Tent. Draft No. 1, 1989); American Bar Association Commission on Mass Torts, Report and Recommendations (1989); Rowe & Sibley, Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction, 135 U. Pa. L. Rev. 7 (1986).

Consolidation of separate cases and severance of common issues for combined disposition should be employed to expedite disposition of cases if it can be done effectively efficiently and fairly. Occasions to combine separate lawsuits are likely to continue increasing. Our preceding recommendation, for example, proposes authorization of transfer for trial as well as pretrial proceedings and supports creation of a new federal jurisdiction as part of diversity jurisdiction reform for multiparty, multiforum litigation. The implementation of such authority usually involves consolidation of cases for handling of common issues, often followed by severance of issues for individual trial treatment. Such consolidation and severance mechanisms will become increasingly important and are to be encouraged when they can be used effectively and fairly.

Unfortunately, consolidation is not always desirable, and there are grounds for uneasiness with routine consolidation of cases and separation of issues for trial. Combination may not always be economical, for example, and trial on liability issues alone may skew results. Thus, while it is important to make consolidation possible for cases in which it is desirable, guidelines to aid its use could reduce its misapplication when combination might be inappropriate.

At present, case law and commentary provide few guidelines for the judiciary. The American Law Institute Study of Complex Litigation has suggested criteria bearing on the problem, such as the size and subject matter of the dispute, geographic dispersion of actions, the nature and significance of local concerns, the stage of the litigation, and the relative importance of common issues.<sup>11</sup> This Committee is not the body to devise specific guidelines, but it recommends that they be included in further revisions of the Manual for Complex Litigation or perhaps eventually in the Federal Rules of Civil Procedure.

- Congress and the Federal Judicial Center should develop special procedures that would avoid undue relitigation of pertinent issues and otherwise facilitate prompt and economical disposition of individual claims, for the small number of instances in which extraordinarily high numbers of injuries are caused by a single

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11. American Law Institute, Study of Complex Litigation 3.01 (Tent. Draft No. 1, 1989); see also *id.* 3.06.

product or event (such as litigation involving asbestos, the Dalkon Shield and Agent Orange).

Occasionally, products or events of massive impact may give rise to tens or hundreds of thousands of claims, sometimes concentrated in certain areas of the country. A recent example is litigation concerning injuries traced to asbestos. Such "mega-cases" can swamp several federal districts and/or state court systems with the task of relitigating similar issues and resolving individual issues. In some instances courts have concluded that it would be impossible to handle such cases in the traditional manner.

Courts confronted with such problems have therefore improvised in an effort to reduce relitigation. Asbestos caseloads have been managed through mass trials or certification of all pending cases in the district as a class action. See, Jenkins v. Raymark Indus. Inc., 782 F.2d 468 (5th Cir. 1986); Wilson v. Johns-Manville Sales Corp., 107 F.R.D. 259 (S.D. Tex. 1985), aff'd on other grounds, 810 F.2d 1358 (5th Cir.), cert. denied, 108 S. Ct. 97 (1987). In Agent Orange, a class action led to a class-wide settlement achieved with heavy judicial involvement. Congress itself designed a scheme for black lung victims to cope with similar problems.

The experience to date does not indicate that there is any single answer to such problems, but the pressures of such mega-cases warrant consideration of alternatives to the traditional approach. There are, however, substantial questions about the desirability of such alternatives. For example, the black lung scheme led to heavy judicial burdens. Other experiments with administrative alternatives to judicial resolution have experienced problems, and both the Asbestos Claims Facility and the Center for Claims Resolution (established by prospective defendants and their insurers, after negotiations with plaintiff lawyers) have not enjoyed great success. Thus it is not proposed that such alternatives be considered for situations that do not present the great problems of the mega-cases.

Neither does it seem likely at present that a single approach could be developed in advance to deal with such situations because the pertinent characteristics of mega-cases are likely to differ. Instead, once such an outburst of litigation has occurred, courts before which such cases are pending should consider alternatives to traditional methods such as claims processing mechanisms once liability has been established by traditional litigation, or providing the option of simplified

administrative processing with surer, though possibly lesser, compensation. Substantial traditional litigation would probably be necessary to bring out the contours of the problem and establish fair ground rules for alternative procedures. The Federal Judicial Center should therefore collect and analyze data on the new methods and, when justified, disseminate information on the new methods to other judges before whom such litigation is also pending. Once some experience is gained with such alternatives, it may be that studies will suggest wider applications for them. When appropriate, Congress should consider legislation to facilitate the resolution of mega-cases by altering the substantive terms for relief or establishing an alternative remedy scheme.<sup>12</sup>

### 3. Criminal Jurisdiction

The rapid expansion of the federal criminal caseload due to drug prosecutions threatens to overwhelm the resources of the federal courts. The Committee believes the situation is urgent and asks for rapid congressional action on two related proposals:

- ▶ Congress must appropriate resources to enable the federal courts to deal vigorously and effectively with their enlarged criminal caseload. Congress should provide both (1) the resources requested in the Judicial Conference report of March, 1989, and (2) additional judgeships.
- ▶ The Committee recognizes the magnitude of the drug problem and that the federal courts must play a major and growing role in the campaign against drugs. However, the Committee also recognizes that exclusive or dominant reliance upon federal (as opposed to state) prosecution of drug law violations will overwhelm the resources of the federal courts and make it impossible for the federal courts to carry out their other constitutional and statutory responsibilities. Absent prompt action to forge federal-state partnerships in the drug enforcement effort, the projected tidal wave of

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12. D. Hensler, et al., *Asbestos in the Courts: The Challenge of Mass Toxic Torts* 117-24 (1985); D. Hensler, et al., *Trends in Tort Litigation: The Story Behind the Statistics* 33-34 (1987); P. Schuck, *Agent Orange on Trial* 277-86 (1986); Marcus, *Apocalypse Now?*, 85 Mich. L. Rev. 1267, 1281-84 (1987).



drug-related cases will alter and reshape the federal judicial system.

An effective drug enforcement strategy requires a partnership between the federal government and the states, with each partner playing a distinctive role. The campaign against drugs must be fought not only in the federal courts, but also in the state judicial systems. Given the small size of the federal judiciary, federal drug prosecutions must be limited to cases that cannot be effectively prosecuted by the states.

- To the extent that Congress can provide additional federal funds for drug enforcement, those funds should be used primarily to provide federal assistance for drug enforcement at the critical state and local level, including resources for local assigned counsel, and not to fund further federal prosecutions.<sup>13</sup>

The federal courts are at a crucial turning point in the drug war. The criminal caseload has expanded dramatically in the 1980s, and this trend continues to accelerate. Criminal case filings have risen by 56% during this period; drug filings have increased by 229%. Drug cases now account for 44% of the criminal trials and roughly 50% of the criminal appeals. In light of the anti-drug legislation passed in 1988, the Judicial Conference estimates that by 1991 drug filings will increase by 20-50% over 1988 levels. The impact of the increased number of drug prosecutions is especially significant because drug cases tend to consume more resources than non-drug cases.

Absent congressional action, the increased criminal caseload will soon overwhelm the resources of the federal courts. A rapid diversion of resources from civil to criminal cases is occurring. Because of the speedy trial laws, criminal cases must take priority over civil cases. Some districts with heavy drug caseloads already are near the point where they no longer try any civil cases. Unless the growth of the criminal caseload is restricted, Congress will be forced either to substantially enlarge the federal courts or to drastically restrict federal civil jurisdiction to offset the increase in the criminal caseload. The Committee believes the situation is urgent.

The Committee believes Congress should respond to this crisis with a two-part strategy:

(1) Congress should increase appropriations for the federal courts to permit them to respond vigorously and effectively to their enlarged criminal caseload. Congress should provide not only the resources requested in the March 1989 report of the Judicial Conference<sup>14</sup> but also additional judgeships.<sup>15</sup> We believe the situation is far too urgent to wait for the 1990 biennial judicial survey.

(2) Congress must recognize that no matter how rapidly the capacity of the federal system -- courts, prosecutors, public defenders, and prisons -- increases, the war against drugs cannot and will not be won or lost solely in the relatively small federal system. No matter what happens in the federal courts, the war against drugs must be fought primarily at the state and local level. Many of the new drug cases now flooding the federal system could be just as effectively prosecuted in state court as in federal court. These cases find their way into federal court because Congress has provided funds only for federal and not for state prosecutions. The resulting mercurial increase in federal prosecutions will require either a massive increase in federal judicial capacity or a major cutback in federal civil jurisdiction. Either choice would alter the fundamental character of the federal courts.

No fundamental change in the federal courts is necessary to combat the drug crisis while equipping the federal judiciary to carry its share of the load. The federal drug enforcement strategy should be refocused (1) to limit federal prosecutions to the relatively small number of cases that cannot be effectively prosecuted by the states (because, for example, they involve

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14. This includes, inter alia, funding for magistrates, probation and pretrial service officers, substance abuse treatment program, defender services, and court security.

15. Our recommendation for additional judgeships is to be considered an emergency, triage measure and should not be confused with our overall recommendation that Congress and the Judicial Conference investigate alternative means for reducing caseload before encouraging the appointment of additional judges.



international or interstate elements),<sup>16</sup> and (2) to employ any additional funds primarily to support effective state and local enforcement in the remaining cases. This revised strategy is the best way to fight the war on drugs and the best way to preserve the ability of the federal judicial system to play its vital and historic role of interpreting and enforcing federal law and rights as a whole.

Separate statement of Edward S. G. Dennis, Jr.:

Limiting federal participation in the war on drugs ignores the reality of present day law enforcement. In several major pieces of substantive and funding legislation since 1984, Congress has made a clear policy choice that drug and drug-related cases, such as forfeiture actions and money laundering prosecutions, will be a significant part of the work load of federal courts for the foreseeable future. Congress should not diminish the federal role it has legislated in drug prosecutions.

The Department of Justice has developed and followed a National Prosecution Strategy, and has forged relationships with state and local law enforcement authorities to implement that strategy. It has had the District Law Enforcement Coordinating Committee (LECC) program for the last 8 years. The LECCs were established in 1981 in all 93 federal judicial districts, and they consist of federal, state, and local investigative and prosecutive agencies. Their goal is "to improve cooperation and coordination among law enforcement groups and thereby enhance the effectiveness of the criminal justice system."

Similarly, the Organized Crime Drug Enforcement Task Force (OCDETF) offices were created in various districts

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16. The Committee is not calling for any new statutory limitation on federal drug prosecutions. The Committee is recommending that the Department of Justice exercise greater selectivity in deciding whether to bring drug prosecutions in the federal courts, since a continuation of current policies will swamp the system with cases that could and should be prosecuted in the state courts. The Committee is also recommending that Congress reallocate support for drug prosecutions, so that funds for federal prosecutions are proportional to the small size of the federal courts. If additional federal funds are available, they should be used to support state prosecutions.

around the country in 1982 to permit the Department of Justice to coordinate federal, state and local law enforcement in an effective national strategy by establishing task forces of federal, state and local prosecutors and investigators to undertake a unified approach against drugs. Federal policy is to coordinate with local prosecutions, not to "federalize" them. Cutting back federal participation in this national strategy is a step backwards in the nation's efforts against drugs.

The most recently published statement of overall drug prosecution strategy, the National Narcotics Prosecution Strategy, prepared by the National Drug Policy Board in early 1988, describes a three-level federal strategy. Overall, the "strategy is designed to ensure that state and local law enforcement authorities are properly staffed, equipped, funded, and trained to maximize the impact of drug enforcement efforts within their jurisdictions."

Strategy 1 seeks to identify the major traffickers responsible for narcotics importation and distribution. Strategy 1 targets are defined as one of several classes of persons including those who operate significant national and international enterprises, enterprises operating within exclusive federal jurisdiction (such as on the high seas or abroad), and significant local and regional violators who have been designated for federal prosecution by an LECC.

Strategy 2 calls for "the federal government to provide training and assistance to help state and local authorities in their pursuit of large intrastate enterprises and, in some jurisdictions, to help formulate legislative proposals creating the necessary statutory tools to ensure that violators are adequately punished and their assets completely forfeited."

Strategy 3 calls for federal prosecution of those cases which must be prosecuted "in order to maintain public confidence in law enforcement, avoid the perception of gaps in narcotics enforcement, respond to urgent or developing local drug problems, and assist and complement state and local law enforcement efforts." Federal prosecutors take great pains to prosecute only those cases that the states cannot handle. The Southern District of Florida declination guidelines on cocaine cases, for example, call for the referral of seizures of less than five kilos to the state for prosecution, except for airport and seaport seizures where seizures of less than one half a pound are to be referred to local authorities.

Airport and seaport cases are, of course, highly indicative of importation, and importation cases are properly the concern of the federal government.

Underlying the Committee's recommendation is the assumption that the increased burden on the courts is due to the federal government's straying from its federal mandate. The federal caseload has increased because federal law enforcement is doing what it is supposed to be doing. Drug cases have become more complex; pretrial detention hearings and forfeiture proceedings require court time in excess of the traditional trial. The rise in federal prosecutions is not due to a flood of nickel bag "buy/bust" prosecutions; more cases that are being investigated simply match the federal profile.

The mere fact that smaller drug cases may appear periodically in federal court should not be taken as a sign that there has been a breakdown in federal coordination of drug prosecutions. The smaller cases brought in federal court may be a result of the increased use of drugs in areas where the federal government has exclusive jurisdiction or in border smuggling cases. On the other hand, they may be predicates to broader investigations that are ultimately aimed at large-scale prosecutions fitting the more traditional federal profile. In coordination with state and local prosecutors, federal investigators and prosecutors may target a criminal enterprise that is best attacked initially from the street level distributor.

Finally, those incentives cited in the Committee's recommendation that may now exist to bring cases into federal court instead of state court (e.g., forfeiture provisions, pretrial detention, harsher sentences) are being lessened as the state legislatures are following the federal government's lead in enacting stiffer laws. To this extent, the federal government has played an entirely appropriate role in providing an example for legislation and enforcement to the states. For these reasons, I dissent from the recommendation.

#### **PAROLE ELIGIBILITY HEARINGS ("OLD LAW" PRISONERS ONLY)**

- Congress should extend the life of the U.S. Parole Commission (or create a successor agency) to hold parole hearings for "old law" prisoners as long as any "old law" prisoners remain in the federal correctional system.

The Sentencing Reform Act of 1984 provides for the abolition of the U.S. Parole Commission in 1992. Long after that date federal prisons will still house prisoners serving "old law" sentences, i.e., sentences that were imposed under the preexisting law that provided for parole. Presently no provision exists for any agency to assume the function of determining the eligibility for parole of such "old law" prisoners when the Parole Commission is abolished in 1992.

Unless some agency is authorized to determine the eligibility of such "old law" prisoners, these prisoners, who will be entitled to court-ordered release before the completion of their sentences, will remain incarcerated. However, the ex post facto clause of the Constitution forbids making the penalty for an offense more onerous once the offense has been committed. As this clause has been interpreted, the Committee thinks that making parole unavailable for an offense subject to parole at the time of commission would be unconstitutional. Accordingly, unless Congress authorizes some agency to consider "old law" prisoners for parole, after 1992 a large number of "old law" prisoners will bring ex post facto claims in federal court under 28 U.S.C. § 2255 challenging their continued incarceration. Since these claims would presumably be meritorious, we believe that the federal courts would have to order the release of these prisoners.

In enacting the Sentencing Reform Act, Congress gave little consideration to the problems that would be posed by "old law" prisoners. The failure to provide for some agency to assess parole eligibility of the "old law" prisoners was an oversight that should be corrected now, before it results in burdensome federal litigation and the release of potentially dangerous federal prisoners.

#### **PAROLE REVOCATION HEARINGS ("OLD LAW" PRISONERS ONLY)**

- ▶ Congress should extend the life of the U.S. Parole Commission (or create a successor agency) to hold parole revocation hearings for "old law" prisoners who are alleged to have violated the conditions of their parole after 1992.

As discussed above, The U.S. Parole Commission is scheduled for abolition in 1992. At that time, the Sentencing Reform Act will transfer the responsibility for holding parole revocation hearings to the federal courts. The burden on the courts will be a substantial one, although it will decrease over time as "old law" prisoners finish serving their sentences. The Parole Commission



estimates that in the first year following the Commission's abolition (1) 16,000-20,000 "old law" prisoners will be on parole, and (2) it will be necessary to hold approximately 1,300 revocation hearings involving these parolees.

In abolishing the Commission, Congress shifted the parole revocation function to the federal courts for lack of any other obvious alternative. Assuming that Congress extends the life of the Parole Commission (or creates a successor agency) as is suggested above, this agency should retain jurisdiction over parole revocation hearings. No persuasive reason has been stated for shifting these hearings to the federal courts, which are already overburdened.

#### HEARINGS ON REVOCATION OF SUPERVISED RELEASE

- The federal district courts should retain jurisdiction over hearings on government petitions to revoke supervised release, but Congress should authorize district judges to refer the hearing and final decision regarding revocations to United States magistrates.

Although there are still many "old law" prisoners in the federal system, the Sentencing Reform Act of 1984<sup>17</sup> abolished parole and created the concept of supervised release. Unlike parole, supervised release was not intended to be subject to revocation. Later legislation, however, erased the sharp distinction between parole and supervised release by providing that violation of the terms of supervised release could result in revocation of release, and thus result in reimprisonment. The district courts were authorized to conduct hearings on the revocation of supervised release.

Although only a trickle of cases have been seen to date, when the new system becomes fully operative the burden of hearings (on the revocation of supervised release) will be substantial. Although it is not possible to project the caseload with precision, the Parole Commission estimates that by 1992, approximately 3,500 hearings per year will be held on the revocation of supervised release.

This proposal is based on the resolution adopted by the Judicial Conference Committee on Criminal Law and Probation Administration. The Judicial Conference

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17. P.L. No. 98-473, tit.II, Ch.II, 98 Stat. 1987.

Committee takes the position that the consequence of revoking supervised release is so severe that the individual should be entitled to a judicial hearing, not merely an agency hearing where the presiding officer will be a corrections official rather than a law-trained judicial officers. The Committee's resolution observes that "supervised release is analogous to the imposition of a new sentence after the original sentence has been served. Sometimes it will be a long sentence." An individual does not begin a term of supervised release until he has served his entire sentence of imprisonment. (In contrast, parole has traditionally been regarded as a matter of grace since the prisoner is released before he completes his full term of imprisonment.) If an individual violates the terms of his supervised release, he may be reimprisoned for all or part of the authorized term of supervised release (without credit for the time he already served on post-release supervision). For some offenses both supervised release and reimprisonment upon its revocation may be for as much as 5 years. Even assuming that there is no theoretical difference between parole and supervised release, the terms of reimprisonment can be so long that a judicial hearing should be provided.

In order to reduce the strain on the courts, the Judicial Conference Committee favors legislation allowing district judges to refer both the hearing and final disposition of supervised release revocation to U.S. magistrates. The Committee is also exploring other ways of expediting consideration of these cases.

In the alternative, some members of the Committee are of the view that Congress should transfer jurisdiction over hearings to revoke supervised release from the federal district courts to the United States Parole Commission or its successor.

#### 4. Section 1983 Litigation: Exhaustion of State Remedies in State-Prisoner Suits

Congress should amend 42 U.S.C. § 1997e to (1) delete the minimal standards required by § 1997e(b); and (2) provide that federal courts in suits brought by state prisoners under 42 U.S.C. § 1983 shall require the plaintiff to exhaust his state administrative remedies for a period of 120 days, provided the court is satisfied that the remedies are fair and effective.



Exhaustion of state administrative remedies is generally not required in suits under 42 U.S.C. § 1983. However, 42 U.S.C. § 1997e requires such exhaustion in state prisoner cases if the prison provides an administrative remedy that has been certified as adequate by the Attorney General of the United States, or by a federal court. But the procedures of the Justice Department for certifying a state's system are slow and the substantive standards (especially those requiring inmate participate in the design and administration of the system) are onerous from the states' perspective. As a result, few states have sought or obtained certification under this statute. Meanwhile, the federal courts are inundated by state prisoner suits, most lacking merit and many of those that are meritorious seemingly amenable to administrative resolution.

Section 1997e has not succeeded in its aim of encouraging state administrative resolution of prisoner civil rights claims; the Committee therefore recommends that it be amended. The key to making this statute more effective appears to be greater flexibility in the requirements for a satisfactory remedy. There is no need to impose specific minimum requirements. Federal prisons do not follow these same procedures, and some states have implemented effective administrative remedies that do not conform to present 1997e. Accordingly, we recommend that the state be allowed to persuade either a federal court or the Attorney General that its remedy is fair and effective. If the prison makes this showing, the prisoner should be required, for a period not to exceed 120 days, to first seek relief there. The burden of showing that its remedy is fair and adequate lies on the state.

Since these are rarely "fast track" cases, the period of exhaustion should not cause a substantial hardship on the prisoner -- and in cases where it would, this hardship would be grounds for the district judge's declining to find the state remedy fair and effective in those circumstances.

If only a small fraction of prisoner cases were successfully resolved by the administrative route, the saving in judge time would still be considerable because of the enormous volume of these cases. Even were a dispute not settled at the administrative level, the record compiled there might assist the district judge in his or her determination (though we do not believe that this record should have any formal preclusive effect). Exhaustion is required in all federal prisoner cases, and

the requirement has not proved onerous even though there is no time limit, as there is under our proposal.

**B. CREATION OF SPECIALIZED TRIBUNALS**

**1. Social Security Disability Review**

- ▶ Appellate review of social security disability claims in the general courts of appeal should be confined to constitutional claims and issues of law only.
- ▶ A new Article I court, the Court of Disability Claims, modeled on and perhaps joined to the Veterans' Disability Court, should be established to review decisions on social security disability benefits entered by the Administrative Law Judges.
- ▶ The Administrative Law Judges should be removed from the Social Services Administration and be established as an independent corps.
- ▶ Efforts should be continued to improve both the quality of the record and the determinations made at the state level.

Currently, social security disability claims are reviewed in five stages: (1) an initial determination (with a right to reconsideration) at the state level; (2) a hearing before an Administrative Law Judge; (3) review by the Appeals Council of the Social Security Administration; (4) review in the district court on the administrative record; and (5) de novo review of the district court's decision by the court of appeals. Not only is the administrative process cumbersome and duplicative, but recent experience demonstrates that it is vulnerable to political control. Strengthening the administrative process, we think, should mitigate the need for judicial review. Accordingly, the Committee makes several recommendations for reformation.

In recent years, the Social Security Administration has made controversial efforts to limit the number and amount of claims granted by the ALJs; as a result, it has been asserted that the ALJs' independence has been

improperly compromised.<sup>18</sup> From the ALJ, appeals are heard by the Appeals

Council of the Social Security Administration, which lacks even the independence of ALJs protected by the Administrative Procedure Act. To summarize, the system is plagued by inadequate administrative review, followed by duplicative review by Article III courts.

One proposal for improving the review process advocates termination of the claimant's right of appeal at the district court level. This proposal was rejected on the ground that this would make social security claimants "second class citizens" and that the district courts are ill-suited to perform these appellate functions. A second proposal establishing a specialized court of appeals for disability cases (i.e., the proposed Court of Disability Appeals) as an Article III court, was also rejected on grounds that the heavy caseload would require the appointment of too many Article III judges.

Recognizing that the principal issues in social security disability cases are factual and technical, we propose to attract to the administrative level competent specialists in disability law by encouraging the independence of the administrative law judges and creating an Article I court of disability appeals. These two changes, we believe, will provide a superior examination of the facts than the federal district courts currently provide. If necessary, further review would be to the courts of appeals. Review would be confined to constitutional claims and issues of law. An additional tier of review for questions of fact, such as is presently provided by the courts of appeals, is not necessary. This is true even for questions concerning the sufficiency of evidence, which would not be considered questions of law. We therefore contemplate fewer appeals to the Courts of Appeals.

The Appeals Council of the Social Security Administration should be divested of its adjudicative function and be reconstituted as an agency to develop and revise the regulations that guide the adjudication of social

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18. See Social Security Disability Reviews: The Role of the Administrative Law Judge, Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. (1983); D. Cofer, Judges, Bureaucrats and the Question of Independence: A Study of the Social Security Administration Process (1984).

security disability cases; its relationship to the ALJs and the Court of Disability Appeals could resemble that between OSHA and OSHRC (the Occupational Safety and Health Review Commission).

Conceivably, the Court of Disability Appeals could eventually adjudicate appeals from all decisions by administrative law judges under federal disability programs, including the veterans' claims now handled by the newly created court of veterans' appeals (a model, indeed, for our proposed court of disability appeals). It is hoped that the enhanced power and prestige of such a court would attract the ablest specialists in disability law. The broader its jurisdiction, the more the new court will alleviate the Article III judiciary's disability caseload.

To summarize, our proposal would increase the amount and quality of meaningful review that social security disability claimants receive, while significantly reducing appellate federal judicial workloads at both the district court and court of appeals levels.

As an alternative to the creation of a specialized court to hear Social Security appeals, it has been suggested that consideration be given to reconstituting the existing Appeals Council in the format presently exemplified by the Benefits Review Board. This administrative appellate entity reviews findings by ALJs in Black Lung as well as Harbor and Longshore Workers cases in which disability claims are in dispute. The Benefits Review Board has been generally considered successful and the model could be adopted in the Social Security claims area. This proposal offers several advantages:

1. It would not contravene the general policy against creating specialized courts, particularly one with a very narrow focus;
2. The structure has been thoroughly tested;
3. It would offer a career track to ALJs and make their positions more attractive;
4. It would not increase the number of courts;
5. It would be expected that its process would be less formal and less expensive than traditional court procedures.



This suggestion extends also to an alternative to the proposal that Article III judicial review in Social Security cases be confined to the Courts of Appeals. Any provision for Article III court review must recognize the critical problem of overwhelming caseloads in the Courts of Appeals. The district courts are also struggling with heavy dockets. However, the total number of district judges far exceeds the number of three-judge panels which could be constituted in the Courts of Appeals. It follows that providing Article III review by channelling Social Security appeals to the district judges would result in a far lighter burden per judge than providing for initial review in the Courts of Appeals.

If this proposal were adopted, it would be possible to continue review of the substantiality of the evidence, a critical element in reviewing Social Security claims.

The same allocation of finite resources would be appropriate in Black Lung cases and Harbor and Longshore Workers cases where review is presently had in the first instance in the Courts of Appeals. In those administrative law cases and in others such as NLRB appeals, Article III review should be in the district courts initially with resort to the Courts of Appeals, by leave, to maintain uniformity of law. Again, the burden placed on the district judges would be far less than that on the Courts of Appeals.

## 2. U.S. Tax Court Reform

- ▶ The U.S. Tax Court should be transformed into an Article III court with exclusive jurisdiction in both trials and appeals over federal income, estate, and gift tax cases.

The present system of federal tax adjudication is structured irrationally and fosters the development of conflict in the interpretation of the tax laws. It is unfair to some taxpayers, encourages forum shopping and provides additional incentives for taxpayers to play the "audit lottery." Under current procedures, a tax claimant can choose from three separate fora: the U.S. Tax Court, the U.S. Court of Claims or the local U.S. District Court.<sup>19</sup> Appeals from the district courts are heard by

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19. A taxpayer who pays under protest a tax assessed against her can bring a refund suit in the federal district court where she resides or in the Court of Claims in Washington, D.C. Or she can decline to pay the  
(continued...)

the federal courts of appeals. Similarly, appeals from the U.S. Tax Court are heard by the court of appeals for the circuit in which the taxpayer resides. Appeals from the Claims Court are heard by the Court of Appeals for the Federal Circuit.

Accordingly, trials of tax matters are heard in three separate courts and appellate litigation in the tax field is sorted out among the twelve regional courts of appeals and the Federal Circuit. Few of these courts have the time or the substantial volume of tax appeals necessary to develop expertise in what is one of the most highly specialized and technically demanding fields of law in American jurisprudence.

The Committee believes the current system is unduly complex and in need of reform. Although the reformation proposed would not provide substantial workload relief to the district and appellate courts (because the total volume of tax litigation is not high),<sup>20</sup> reform still is sufficiently desirable that it deserves treatment in this Report.

Accordingly, the Committee proposes to transform the U.S. Tax Court into an Article III Court with exclusive jurisdiction over federal tax litigation at both the trial and appellate levels.<sup>21</sup> This proposal could be accomplished by dividing the current Tax Court, which consists of nineteen judges, into two divisions -- a trial division and an appeals division. Article III status would be conferred on the Tax Court judges. The Internal Revenue Service would represent the government at the trial level; the Department of Justice would handle the appeals.

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19. (...continued)  
assessed tax and contest the deficiency in the U.S. Tax Court, an Article I court comprised of 19 judges located in Washington, D.C., but riding circuit.

20. 95% of the current tax caseload is handled by the nineteen judges of the Tax Court.

21. Although enforcement actions (e.g., the fixing of jeopardy assessments and the enforcement of federal tax liens) would remain in the district courts.



Presumably, the initial membership of the court would consist of the judges of the present Tax Court plus additional judges as are necessary to handle its increased trial workload and the federal tax appellate workload now divided among the thirteen federal courts of appeals. Since the Tax Court already handles approximately ninety-five percent of all federal tax cases, we believe only a modest increase in the number of judgeships would be necessary to handle the court's increased workload at the trial level. In fact, the Committee estimates that only one or two more judges need be appointed at the trial level, and that five additional judges would be needed to hear appeals.

The court presumably would be located in Washington, D.C., as it is now, and its judges would ride circuit as they do now (and possibly hear appeals as well). Depending on the distribution of cases, it may be desirable to establish regional courts, so that the judges could ride smaller circuits. As in the present Tax Court, litigants would have no right to a jury trial.

The Article III status of the judges should insulate them from undue influence by the Treasury Department and would thus eliminate the need to provide taxpayers with "competitive" alternatives in the federal district courts and in the Claims Court.

Our proposal, if implemented, should (1) reduce forum-shopping, (2) simplify tax adjudication, (3) relieve (albeit modestly) the workload pressures on the traditional Article III courts, (4) reduce the pressure on the Supreme Court to grant certiorari in tax cases to resolve intercircuit conflicts, (5) provide greater protection to the taxpayer by assuring access to an Article III court (now available as a practical matter only to those taxpayers able to pay the assessed tax and then sue for a refund), and, above all, (6) increase the quality and uniformity of tax adjudication by shifting it from overworked judges sitting in a large number of diverse courts to a court of highly trained specialists.

Five members of the Committee, including a representative from the Department of Justice, believe the Committee's recommendation does not have sufficient support within the tax bar to merit attention. They also expressed concern that this new Article III court may be asked to resolve federal issues other than federal tax questions when hearing a "mixed" case involving a federal tax question and a nontax federal question. They expressed uncertainty whether the new Article III Tax Court judges should review nontax federal issues, as well.

Also, they stressed that many of the issues raised in tax cases are state law issues and are more properly heard by a local federal court of appeals. They also argued that the taxpayer's confidence in the fairness of the tax system depends, in part, on the viability of his or her access to the regional courts of appeals, an option that would be foreclosed under the Committee's proposal.

Separate statement of Edward S.G. Dennis, Jr.:

The Committee's proposal would consolidate judicial review of most tax controversies in a single specialized court. That position has been rejected by those most intimately connected with the tax litigation system: the Internal Revenue Service, the Justice Department, the Tax Court and a Task Force established by the Tax Section of the American Bar Association. There is ample evidence that the existing system of tax litigation is performing well, serves important interests and does not impose an undue burden on either the district courts or the courts of appeals. We therefore dissent.

The majority's proposed reforms cannot be justified in terms of relieving the workload of the federal judiciary. Available statistics support that conclusion.

The majority maintains that the current system of judicial review has produced a "substantial" number of unresolved intercircuit conflicts on tax issues. However, the Justice Department has indicated that, of the approximately 1500 appeals it handled in 1987 and 1988, there were at most five unresolved and currently-significant conflicts. Similarly, a recent study conducted by the University of Virginia Tax Law Review found that, from 1983 through 1987, there were only 35 intercircuit tax conflicts, more than half of which appear to have been either resolved by the Supreme Court or otherwise mooted.

The majority asserts a need to have tax cases heard by judges with special expertise. We do not agree. We believe that generalist judges perform a critical role in the adjudication of tax disputes. Particularly, at the appellate level, generalist judges provide balance, allowing the technical expertise of the Tax Court to be complemented by a general legal consideration that enriches the field of taxation and helps ensure that the tax laws are understandable to the public.

This brings us to our most important point. We are gravely concerned that centralizing substantive tax disputes in a specialized trial and appellate court would

leave the American taxpayer with the impression that the judicial system is remote and unresponsive. In the end, this perception could undermine the voluntary compliance with the revenue laws that all concede is the cornerstone of our system of taxation. This concern is shared by both the public and private tax bars. In his letter to the Committee, the Commissioner of Internal Revenue, for example, stated that the perceptions of the nation's taxpayers are of "utmost importance," and that he fears that the proposed reform could "reduce taxpayer confidence" and undercut voluntary compliance. The Commissioner also pointed out the value of extending to the taxpayer the option of having the case heard by a local judge.

We believe that in the field of taxation, the perceptions of the public assume an importance that are more critical than they may be in other areas. The majority's proposal runs contrary to that important consideration. The evidence indicates that the problems of inconsistent judicial rulings is not a substantial factor in the field of taxation but in any event, the problem of intercircuit and intracircuit conflicts demands a systemwide solution rather than one confined to one narrow area.

We therefore see no need to revise the present structure for litigating federal tax controversies other than to recommend that the jurisdiction of the Court of Claims in this area be deleted as being redundant to that of the Tax Court and the district courts.

### **3. Bankruptcy Appellate Structure**

- ▶ Each circuit should establish "bankruptcy appellate panels" (BAPs) with the provision that joint panels may be created with neighboring circuits.
- ▶ Congress should amend the laws governing appeals in bankruptcy cases in two respects:
  - (a) Provide that the consent to findings of a bankruptcy judge in "non-core" proceedings be implied unless an objection to them is raised within thirty days;
  - (b) Amend 28 U.S.C. § 1334, 28 U.S.C. § 1452, and 11 U.S.C. 305, to clarify that these statutes forbid appeals only from the district courts to the courts of appeals, rather than from bankruptcy courts to the district courts.

The Committee recommends that the Judicial Councils of each circuit establish "Bankruptcy Appellate Panels" (BAPs).<sup>22</sup> Where currently utilized,<sup>23</sup> BAPs have reduced the workload of both the district courts and the courts of appeals, while receiving favorable review from both bench and bar.

In those circuits without BAPs, bankruptcy appellate structure resembles the system used in social security disability cases and is subject to the same criticisms. Bankruptcy appeals are heard by the district judge who functions purely in an appellate role. Once his work is completed, the review process is duplicated by the court of appeals, whose review of the district judge's legal determination is plenary.

In the Ninth Circuit, however, the parties to a bankruptcy matter can agree to have their bankruptcy appeal heard by a BAP. We favor this system because it fosters expertise and increases the morale of bankruptcy judges, in part by creating an appellate career track. In addition, BAPs have reduced the number of bankruptcy appeals, thereby significantly alleviating work load

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22. The Bankruptcy Reform Act of 1978, 11 U.S.C. 101 et seq., provides that decisions of the bankruptcy judge are to be heard by the district court, and from there, by the court of appeals. If the parties so stipulate, an appeal can be taken directly to the court of appeals. This Act also provided a third option: If a circuit council desired, it could establish "bankruptcy appellate panels" (BAPs) to hear appeals from judgments and orders entered by a bankruptcy judge instead of the district court. Decisions of a BAP, which consists of three-judge panels of bankruptcy judges, could be appealed to the court of appeals.

23. Only two circuits have established BAPs. The First Circuit established a BAP in 1980 to hear appeals from all districts in the circuit except the District of Puerto Rico. The Ninth Circuit established a BAP in 1979 to hear appeals from two of the 13 districts within the circuit. In 1980, the Ninth Circuit BAP was expanded to cover four additional districts. The First Circuit BAP ceased to operate shortly after *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) was issued; the First Circuit chose not to reestablish BAPs after enactment of the 1989 amendments. The Ninth Circuit BAP has never ceased operating. In 1987 and 1988, it disposed of 902 appeals and 664 appeals, respectively.



pressures on both the district courts and the courts of appeals.

At present, only the Ninth Circuit uses such panels, but we believe the BAP's well-studied success warrants experimentation nationwide. Small circuits should be encouraged to form multicircuit bankruptcy appellate panels since the First Circuit's experiment encountered difficulty with a small number of bankruptcy judges in the circuit and the resulting difficulty in staffing panels at locations convenient to the parties.

(a) Consent in "Non-Core" Proceedings

Under 28 U.S.C. § 157(c)(2), a bankruptcy judge may enter final orders and judgments in non-core<sup>24</sup> proceedings, subject only to traditional appellate review "with the consent of all the parties." This language does not say whether the consent must be express or implied, but Bankruptcy Rules 7008 and 7012 interpret it to require express consent. We recommend amending the statute to provide that the parties to a non-core proceeding will be deemed to consent to the entry of orders and judgments by the bankruptcy judge unless a timely objection is made.

This amendment will reduce the workload of the district court by eliminating the need for de novo district court review in non-core proceedings where no timely objections have been filed. An implied consent rule might also reduce litigation over whether a proceeding is core or non-core, because the question will be moot if no party timely objects to the bankruptcy judge's judgment in the

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24. With respect to matters heard by the bankruptcy judge, the 1984 Bankruptcy Amendments and the Federal Judgeship Act of 1984, 28 U.S.C. 158, draw a broad distinction between "core proceedings," which are matters centrally related to administering the bankruptcy case or involving rights arising under the Bankruptcy Code, and "non-core proceedings," a residual category of matters otherwise related to the bankruptcy case. In core proceedings, the bankruptcy judge functions in the manner envisioned by the 1978 Act, conducting hearings and entering final orders subject to appellate review by the district court. In non-core proceedings, the bankruptcy judge conducts hearings, but unless the parties consent to his decision, his findings must be submitted to the district court and have no force unless adopted by that court after de novo review.

matter.<sup>25</sup> Finally, implied consent will eliminate the problem that presently exists in default cases, where the plaintiff often finds it difficult to obtain express consent.

Implied consent in this context should pass constitutional muster. Indeed, the proposal is essentially one to treat findings of a bankruptcy judge the way many courts already treat findings of a magistrate -- a procedure the Supreme Court held constitutional in Thomas v. Arn.<sup>26</sup> Furthermore, the Second, Sixth, and Ninth Circuits have each held that a bankruptcy judge may appropriately enter a binding order in a non-core proceeding in the absence of either any express consent or objection.<sup>27</sup>

#### (b) Needed Statutory Amendments

Finally, we recommend that 28 U.S.C. § 1334, 28 U.S.C. § 1452, and 11 U.S.C. § 305 be amended. These statutes provide that orders regarding abstention or remand of certain bankruptcy claims are unreviewable "by appeal or otherwise." Although undoubtedly intended to disallow appeals on these matters from the district courts to the courts of appeals, these statutes have been interpreted to preclude any appeal from an initial decision maker -- including a bankruptcy judge. Thus, the bankruptcy judge's recommended findings have no force or effect until entered by the district court.

This practice produces considerable delay in resolving these motions, which is contrary to the purpose of the prohibition on appeal. We recommend amending these three statutes to clarify that they preclude only appeals from the district court to the courts of appeals. This procedure would enable bankruptcy judges to treat motions to abstain or remand as core proceedings and to enter binding orders subject to review in the district court. This procedure will speed the disposition of such

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25. See *In re Men's Sportswear, Inc.*, 834 F.2d 1134, 1137 (2d Cir. 1987).

26. 474 U.S. 140 (1985).

27. See *In re Southern Industrial Banking Corp.*, 809 F.2d 329 (6th Cir. 1987); *In re Men's Sportswear, Inc.*, 834 F.2d 1134 (2d Cir. 1987); *In re Daniels-Head & Associates*, 819 F.2d 914 (9th Cir. 1987). In all three cases, Bankruptcy Rules 7008 and 7012, which require express consent, were not yet applicable.



motions, better effectuating the purpose of the limitation on appeals from the district courts to the courts of appeals.

#### **4. Administrative Agencies: Review of Orders**

- ▶ **The Committee opposes the consolidated review of federal administrative agency orders in a specialized Court of Administrative Appeals.**

The Committee studied a proposal urging the creation of a national Article III Court of Administrative Appeals,<sup>28</sup> that would have exclusive jurisdiction to review the orders of the federal administrative agencies. The proposal initially was thought attractive because (1) administrative law is becoming an increasingly technical body of law; (2) review of orders of administrative agencies seldom overlaps or involves other fields of law; and (3) much federal administrative review already is concentrated in the Court of Appeals for the District of Columbia Circuit.

The Committee examined this proposal with care and concluded that, although there are strong arguments in favor of establishing such a court, such consolidation should not be encouraged, primarily because the ensuing court docket would be unmanageable. Although the number of direct review appeals from administrative agencies to the federal courts of appeals is not overwhelming -- approximately 3,000 a year -- this number is misleading in terms of overall impact on the court's workload. First, an administrative review case is sometimes more taxing and requires greater expenditure of judicial resources than the average federal appeals matter. Second, and more important, in addition to the 3,000 direct appeals, many more administrative cases involve challenges to administrative action that is sufficiently final to be reviewable under the Administrative Procedure Act, but is

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28. Two other proposals were considered: (1) establishing the administrative court in the existing D.C. Circuit Court of Appeals, and (2) giving the D.C. Circuit the power to review the administrative decisions of other circuits en banc with the results in D.C. to be binding nationally, subject to Supreme Court review. These proposals, too, were rejected because the Committee thought the D.C. Circuit Court of Appeals would have to be greatly enlarged in order to handle the resulting number of administrative appeals, and establishing it as an intermediate court would result in only incremental gains in uniformity.

not within the scope of any specific statute vesting jurisdiction directly in the courts of appeals. Rather than being challenged directly in the court of appeals, then, such actions are brought in the federal district courts, with a right to appeal to the courts of appeals. To achieve the goal of centralized administrative review, however, these appeals also would have to be vested in the new court -- resulting in a very large, multi-divisioned court that would suffer problems of coordination and uniformity not unlike those of the present system. Accordingly, the Committee concluded that the gains of such centralization were not worth the costs.

### C. NON-ARTICLE III ADJUDICATION

#### 1. Alternative Dispute Resolution

##### Introduction

The term "alternative dispute resolution" has come to cover a broad range of approaches to dispute processing apart from traditional pretrial and trial under courts' general procedural rules, and it often means different things to different people. The number of ADR approaches is numerous and growing as courts and disputants continue to experiment and innovate. Voluntary, binding arbitration is long established and will continue to exist largely outside the judicial system, as will much voluntary conciliation, mediation, and negotiation. The word "alternative," however, may exaggerate the distance between many ADR devices and judicial dispute processing, for courts are making increasing use of "ADR" techniques - and those techniques themselves, such as various forms of judicial involvement in settlement discussions, often took place before the current movement made people think of classifying them as "alternatives." ADR, then, can be independent of the courts or used formally or informally (and with or without the parties' consent) in connection with court proceedings. It can either be a fairly novel device or an aspect of traditional proceedings that may simply be viewed from a new perspective in light of increasing focus on resolution of disputes without full judicial trial.

Among the most common ADR approaches, in addition to those already mentioned, are the somewhat misleadingly named "court-annexed arbitration," which most commonly requires a non-binding hearing and award some months after court filing and before the parties may proceed to trial if they do not accept the award or settle; the less formal "early neutral evaluation" procedure, in which an

experienced, neutral attorney meets together with the parties and counsel fairly soon after filing to discuss issues in a case and evaluates strengths, weaknesses, and possible claim values; having a magistrate, or a judge other than the one who will preside at trial, take part in settlement discussions; optional "fast track" proceedings that provide for limited discovery and early trial; use of special masters for such matters as discovery management in complex cases; and the "summary" (advisory) jury trial, generally used late in the pretrial process to try to facilitate settlement in a case that might require an extensive trial. The goals meant to be furthered by ADR techniques are many and varied, most prominently including reduction of cost, delay, and antagonism in civil litigation. Additionally, however, ADR proponents argue that various alternative approaches can suit many kinds of disputes better than do full, traditional judicial trials. The idea is to "make the forum fit the fuss," and to use "tracking" by case size or other characteristics if another means might be better adapted to the needs of a particular dispute or type of case. Another major emphasis is promoting early, inexpensive, fair and amicable settlements -- which can make an especially great contribution to efficiency and justice because the vast majority of cases filed never reach trial.

From the point of view of an often overloaded judicial system, of course, one key function of ADR can be help in dealing with mounting caseloads. Depending on the future growth of the federal courts' criminal, particularly drug, caseload, alternatives on the civil side are likely to become increasingly essential. If backlogs delay regular justice so much that it is often denied, ADR mechanisms -- if they provide speedy, inexpensive, and satisfactory dispute processing-- can enhance access to justice. Courts can also encourage use of voluntary ADR by such means as informing parties that they may opt out of court-annexed arbitration by electing voluntary, binding arbitration, and by treating lawyers' commitments to arbitration hearings as equivalents to trial commitments.

ADR has many critics as well as supporters, and their concerns warrant serious attention in considering and framing ADR approaches. Perhaps most prominent is a double-edged "second class justice" argument: On the one hand, mandatory court-annexed ADR can itself provide a process that is second class in relation to full trial. Those required to go through ADR proceedings often have smaller disputes and fewer resources -- and see their constitutional right to trial receding ever farther

beyond the horizon. On the other hand, voluntary ADR often means that those who can pay for it opt out of a second-class regular justice system, leaving it to those with no realistic alternative of their own. In both public and private ADR, there can also be reason for concern if the parties are not fairly evenly matched. Moreover, encouragement of settlement can compromise rights to which people are legally entitled; and elimination of cases from regular judicial proceedings can mask wrongdoing and inhibit the development of important public norms.

Yet many studies of different ADR systems report favorable results when measuring both participant satisfaction and, in some cases, effects of ADR devices on cost and delay in litigation. Many jurisdictions have gone beyond pilot programs to making various ADR mechanisms regular parts of their procedures, which seem to be quite broadly accepted by courts, lawyers, and litigants. The challenge for the federal courts is to find ways of achieving the goals and benefits while avoiding or minimizing the dangers perceived by ADR's critics. Many means are available to meet these concerns, such as categorical or individual-case exemptions from mandatory ADR proceedings, use of different judges for settlement and trial, and limits on the cost consequences that can be imposed on impecunious parties.

The proposals that follow do not suggest a single set of ADR approaches for all federal courts but endorse broadened statutory authorization for the courts to adopt local ADR rules, along with provision for a committee to advise, monitor, and report on ADR in the federal courts. A premise of this proposal is that ADR is at a mid-point in its development, beyond the stage at which it should be limited to local experiments but not so advanced as to permit the formulation of uniform national rules -- which might, given variations in local conditions, be an idea whose time will never come. The heart of the proposal, in items (a) and (b), is the "hundred flowers" authorization for local rules coupled with an advisory committee to provide help and some possible check against ill-conceived approaches. Items (c) and (d), proposing that mandatory court-annexed arbitration be among the devices that district courts be authorized to adopt and that limited experiments be permitted with fee-shifting rules, raise important issues but are separable from each other and from the broader proposals in items (a) and (b). Item (e), endorsing the concept of procedural experimentation with control groups, applies to the ADR context but is not limited to it.



- (a) Congress should broaden the present authorization<sup>29</sup> of programs to eliminate any doubt that all federal courts may adopt local rules establishing a range of alternative dispute resolution mechanisms, including, but not limited to, early neutral evaluation, court-annexed arbitration, mediation, involvement of judges and magistrates in settlement discussions, and "summary" (advisory) jury trials. The enabling legislation should require participation by the local bar, dispute resolution professionals, and the public in the draftsmanship of local rules on alternative dispute resolution.

While ADR is a rapidly evolving and complex field, the Committee feels the field is well enough established -- and the workload problems of the federal courts great enough -- that the time for the sharply limited authorizations of 28 U.S.C. § 651-58 has passed. It may also be desirable to regularize somewhat, at least on a court-by-court basis, the profusion of individual and district variations being used in and outside the twenty districts authorized to adopt arbitration programs under 28 U.S.C. § 651-58. Such systemization would not, of course, require that the federal courts' own ADR systems supplant private and voluntary efforts. Making room for nationwide approval does not entail regarding nonjudicial approaches as weeds to be extirpated, and one of the issues that courts should consider in framing their own ADR rules would be the extent of desirable coordination and coexistence with private systems.

The Committee did not feel that it is premature to broaden ADR authorization this soon after the limited permission given with respect to court-annexed arbitration in Title IX of the Judicial Improvements and Access to Justice Act of 1988. The studies called for by that legislation are either nearing completion (with respect to existing court-annexed arbitration programs) or several years off (as to newly authorized programs). The existing forms and resources of the federal courts are under increasing pressure, and several studies of federal and state ADR programs reflect generally favorable results. Federal courts are making increasing use of a wide range of ADR methods; states and localities continue to take

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29. Now limited to twenty federal judicial districts. See, Judicial Improvements and Access to Justice Act of 1988, 28 U.S.C. 651-58.

major strides to add ADR programs to their dispute resolution resources. Accordingly, the Committee concluded that federal district, appellate, and specialized courts should have clear authority, within certain limits, to adopt or experiment with supplements and alternatives to traditional adjudication -- if they choose to so do. Broader authorization for federal local court ADR rules, of course, would not necessarily mean that most courts would seek to institute major ADR programs.

The Committee does not recommend uniform national ADR systems or national provision for specific ADR mechanisms because both local conditions and the views of judges and the users of the justice system vary so greatly. Judges and the bar in some districts seem eager to use such ADR mechanisms as mandatory court-annexed arbitration; in other districts the bench strongly opposes that idea but is favorably disposed toward other ADR approaches. Similarly, simplified "fast-track" or "rocket docket"<sup>30</sup> rules and practices may work well in some districts but could be impractical in others, where heavy criminal case-loads might make the civil fast track a promise that the court could not keep. Because of local variation, the importance of bar support, and the likely usefulness of practitioners' advice, the proposal requires participation by the local bar in framing local ADR rules. Such participation would normally come via advisory or drafting committees which should include dispute resolution specialists and members of the public.

Also because of local variation for types of ADR devices that Congress regards as generally acceptable, we see no reason to prescribe nationwide the adoption of particular approaches at this time. Congress might, of course, wish to rule certain ADR devices or practices off limits. It could also prescribe further standards and guidelines beyond those adopted in Title IX of the Judicial Improvements and Access to Justice Act of 1988, 28 U.S.C. § 652(b)-(d). Those subsections ban mandatory arbitration in constitutional and civil rights cases, require provision for exempting cases from arbitration for good cause including complexity, novelty, or dominance of legal issues, and require local rules to assure the genuineness of consent in voluntary arbitration cases.

Given the importance of the United States government as a regular litigant in civil cases in the federal

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30. Now adopted in the Eastern District of Virginia, for example.



courts, there also needs to be consideration of the extent to which the federal government would be covered by ADR rules. For most purposes, the federal government should be treated like other litigants subject, of course, to certain sensible general exceptions. One means of retaining a degree of executive control over agency use of ADR would be to permit an agency to elect or authorize arbitration within the limits of the agency's authority to settle cases without prior approval of the Attorney General, as is proposed for tort claims under S. 971, the proposed Administrative Dispute Resolution Act.

- (b) An expert committee should be created, with staff, to provide advice and information on ADR approaches and resources; to monitor the collection, analysis, and publication of data on ADR experience and experiments, and to recommend guidelines for ADR use.

The number of types of ADR devices is considerable, and so is the range of situations in which one or more of them might be used. To help courts consider the relevant goals and range of choices, and avoid repeating failed approaches, such wisdom as experience and analysis have generated must be available to districts adopting and changing their own ADR programs, and to judges considering the use of ADR devices. To a considerable extent, these functions are already well served by such offices as the Federal Judicial Center, under whose auspices the advisory group recommended in this proposal might operate.

The proposed advisory committee could make recommendations for analyzing and reporting on the characteristics and performance of ADR programs; collect and disseminate information on resources for training judges, magistrates, court administrators, and ADR neutrals on the issues and methods of ADR, settlement, and case management; develop guidelines for ADR programs; and possibly review proposed and existing local ADR rules at the request of adopting courts. A further issue would be whether any central approval, beyond compliance with relevant Acts of Congress and conformity with the Federal Rules and existing circuit requirements, should be necessary before local ADR rules take effect. To avoid possible bureaucratization, delay, and inhibition on innovation, we recommend against any special approval or clearance requirement. The advisory committee, with experience developed over time, could recommend further legislation on standards and approaches for the use of ADR in the federal court system. Its membership should include practitioners experienced in ADR, dispute resolution specialists, and probably thoughtful skeptics

of ADR. It should not, of course, be the sole permissible source of advice for federal courts considering and implementing ADR programs; many organizations and experts can provide invaluable assistance as well, and one function of an advisory committee could be to act as a clearinghouse for information on such resources.<sup>31</sup>

- (c) Congress should permit (but not require) district court rules to include mandatory ADR mechanisms such as court-annexed arbitration, with limitations on types of cases subject to mandatory ADR reference and a required provision for motions to exempt a case from an otherwise mandated ADR procedure.

One of the more controversial issues concerning ADR in the federal courts is whether the system should require, as opposed to facilitating and allowing, certain ADR procedures. The most prominent of these is court-annexed "arbitration" -- a nonbinding hearing with an award, which, if accepted, becomes the unappealable judgment of the court but with either side free to reject the award and demand a regular trial de novo. The main arguments against such provisions are that they burden excessively, and perhaps unconstitutionally, the right to trial by jury, that they too often add a further step to processes that are already long and costly, and that they provide "second class justice."

The case for allowing mandatory reference, which we recommend, points to consistent upholding of the constitutionality of such arrangements, which invariably allow full de novo trial unless the parties voluntarily agree otherwise. Mandatory reference can often be essential, despite the benefits of ADR, to overcome an adversary's reluctance to agree to anything the other side wants for fear of appearing weak.

Adding a possible layer of proceedings must be viewed in the context of overall net gain or loss in time, expense, and participant satisfaction. Numerous studies indicate that participant satisfaction is high, and that delay and party and system costs overall tend at least not to increase and in some instances to decrease. Of course some individual cases will go through full arbitration hearing and trial, but their numbers tend to be small; and many others conclude earlier through settlement aided by the award, acceptance of the award, or even settlement

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31. See, e.g., Memorandum from Center for Public Resources.

before the arbitration hearing as opposed to much later on the eve of trial. Choosing suitable categories of cases for mandatory ADR is crucial to keep down the incidence of actions going through both arbitration and trial, as is provision for motions to exempt individual cases.

As for "second class justice," the cost and delay in the present system leading to full trial often deny justice and impose irresistible pressure on some parties to settle on unfavorable terms, without the chance to present their cases to a neutral party. Judging from participant satisfaction studies, such an opportunity seems to serve many of the purposes of the "day in court" that many litigants want -- and early, inexpensive, mandatory arbitration can enable more of them to get it.<sup>32</sup> Requiring that court-annexed ADR be voluntary in all cases would probably lead to underuse of valuable approaches, imposing too much cost on the system and its users at too little gain or saving in most cases. Given the debate over the wisdom of mandatory ADR, Congress might wish to include a sunset provision in any broadened authorization for it.

- (d) Congress should forbid financial incentives in mandatory ADR proceedings, except as a sanction for misconduct, in connection with initial arbitration hearings but should permit use on an experimental basis of cost and fee incentives for parties rejecting awards who fail to improve on them in later proceedings, or who reject and fail to improve on a formal post-award offer of settlement. Any measures that would affect liability for attorney fees should assure that absent misconduct, impecunious claimants could not suffer net loss.

Another issue significant to the ADR discussion is the use of financial incentives to encourage the acceptance of results from ADR proceedings. Such incentives are not an essential part of an ADR system, although they can help make parties take an ADR proceeding or its results more seriously. Cost and attorney fee consequences in this connection seem important enough, and in the case of possible attorney fee liability have enough substantive overtones, that decisions about what

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32. See generally, Memorandum from Center for Public Resources, pp. 17-20; Rand Institute for Civil Justice, Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences (1989).

incentives are and are not permissible should be made by Congress and not left entirely to local rules.

Because a purpose of many pretrial ADR hearings is to promote inexpensive access to impartial justice, such early proceedings themselves should be free of the threat of added costs except as a judicially-imposed sanction for misconduct. For some types of proceedings, such as informal "early neutral evaluation," probably no cost consequences should turn on a party's acceptance or rejection of the evaluation. After more formal proceedings such as court-annexed arbitration that provide significant discovery and hearings to disclose more about the facts and issues, a party who is willing to accept the award should probably be immune from having to bear costs of that hearing, whatever the result of any later trial. But some ADR systems do charge the costs of the hearing to a party who rejects the award and fails to do better, or to improve on it by at least ten percent at trial. Others require posting of some amount of money by a party rejecting an award. And proceedings after court-annexed arbitrations that provide some discovery, a significant hearing, and an award may be the best context in which to conduct careful, limited experimentation with the offer of settlement device, under which either party may make a formal offer. If the other side rejects the offer and does not do better (or does not come within a certain percentage of it) at trial, the adversary can lose an otherwise applicable entitlement to post-offer fees or become, to some extent, liable for the offeror's reasonable post-offer attorney fees.

Because of the consequences and intricacy of such provisions, it seems best for now to authorize their use solely in the context of the type of controlled experimentation described in the next recommendation, and perhaps only in a small number of districts. Moreover, various protections in the framing of offer devices can avoid excessively severe effects. Judges can have discretion to deny or limit an otherwise required fee award, and offer rules can specify that plaintiffs may have their recoveries reduced but not exceeded by fee liability. Another promising approach is to deduct fees not from the verdict but from the rejected offer. Legislation authorizing experiments with fee-affecting offer rules should require provisions to avoid



excessively Draconian effects on those least able to face them.<sup>33</sup>

- (e) Congress should authorize and fund sustained experimentation with appropriate guidelines and limitations, and with control groups when feasible, on the working of existing and proposed procedural devices.

Some of the most important questions about ADR devices and other procedural rules, such as whether an ADR arbitration tends to reduce pretrial delay and rates of trial or whether juries with smaller numbers increase verdict variability and reduce settlement rates, lend themselves to empirical research. To be most effective, such research must often have both an experimental population, normally selected by random, subject to one rule and a control group proceeding under the existing system. Moreover, such variations must continue long enough both to produce large enough numbers for meaningful results and to permit participants to adjust to practice under the experimental variant. Experiments conducted under such conditions can yield some of the most accurate information about the different effects that varying forms of rules may have, and can thus contribute greatly to successful procedural reform. Careful and published reports on such experiments are essential.

Experimental variation, of course, raises significant issues of justice and ethics. Depending on the type of rule involved, parties and lawyers may feel that it is unjust for them to be treated differently from others with similar cases, even with the justification of eventual betterment of the law through research on procedural rules. Sometimes such objections can be satisfied or reduced through informed consent or opt-in or opt-out provisions, which may pose the danger of compromising the validity of experimental results. Experiments must respect basic rights and cannot be justified by mere academic curiosity. An experimental device should be one that the system could seriously want to adopt if the results are positive, and money and effort should not

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33. See generally, Memorandum from Center for Public Resources, pp. 20-21; Alschuler, Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases, 99 Harv. L. Rev. 1808 (1986); Rosenberg, Rient, & Rowe, Expenses: The Roadblock to Justice--A Detailed Plan for Making Litigation Affordable, 20:3 Judges' J. 16 (Summer 1981).

normally be spent "experimenting" on measures that are slated for adoption in any event. A limited number of experiments have been successfully conducted in the federal judicial system, but broader experimentation is essential to better understanding of causal relationships and can contribute significantly to the improvement of the justice system.

On balance, the Committee strongly endorses the principle of experimentation on procedural devices and recommends legislation authorizing it, including, in some circumstances, experimental variations on otherwise similarly situated litigant populations to provide control groups for comparison in accordance with established research methodology. (To test verdict variability resulting from different jury sizes, for example, civil cases in four neighboring districts might all be tried by juries of six, eight, ten, and twelve jurors respectively over several years.) The ethical issues in such experimentation call for careful advance consideration and ongoing monitoring of experimental rule variation.<sup>34</sup>

## 2. The Federal Tort Claims Act

- Congress should impose a \$10,000 amount in controversy requirement for access to federal district courts in federal tort claims cases, and establish an alternative procedure for claims below the statutory minimum.

The Federal Tort Claims Act,<sup>35</sup> which waives the sovereign immunity of the United States to suits brought due to torts of its employees, contains no minimum amount in controversy requirement. Thus, it is possible for a federal prisoner, complaining of the loss of a \$2 comb occasioned by the negligence of a guard, to demand (after exhausting his or her administrative remedies) a full-scale trial before an Article III judge. Similarly, a simple suit for damage to a mailbox caused by a mailman may be litigated in federal court under the FTCA. The Committee believes a minimum amount-in-controversy requirement should be imposed for this class of case --

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34. See generally, Federal Judicial Center Advisory Committee on Experimentation in the Law, Report: Experimentation in the Law (1981); Walker, Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments, 51:3 Law & Contemp. Probs. 67 (Summer 1988).

35. Pub. L. 79-601, 60 Stat. 812, 842-847 (codified as amended in scattered sections of 28 U.S.C.).



one which involves routine application of common law tort principles and contains no constitutional, civil rights, or civil liberties overtones.

Note that we do not propose to use the state courts as the federal small-claims courts -- the expected consequence of establishing a minimum amount-in-controversy requirement for a particular class of federal litigation. Instead, the Committee believes that the federal system should provide alternative procedures for cases that involve an FTCA claim, but do not warrant the heavy artillery of the Article III judiciary.

The alternative procedure recommended here might be generalized to other small monetary claims against the federal government. Small cases of purely pecuniary significance do not belong in an overloaded Article III judiciary already groaning under the burden of important federal litigation.

### 3. Title VII: Employment Discrimination Litigation

- ▶ The Equal Employment Opportunity Commission should be authorized under a test program to adjudicate wrongful discharge matters. Claimants would be entitled to elect between seeking relief in the district courts or before the agency, with a right of appeal in either case to the courts of appeals.

Since 1969, the number of employment discrimination cases filed in the federal courts has increased by 2,166% -- from 336 cases in 1970, to 7,613 in 1989.<sup>36</sup> Over the same period, however, all other federal civil litigation has increased by only 125%.<sup>37</sup> The bulk of this increase in employment discrimination cases is due primarily to an enormous jump in wrongful discharge cases.<sup>38</sup> For example,

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36. Figures compiled from data tapes provided by the Administrative Office of the United States Courts; see also Peter Siegelman, An Economic Analysis of Employment Discrimination Litigation (unpublished Ph.D. dissertation, Yale University 1989).

37. Annual Reports of the Director of the Administrative Office of the United States Courts.

38. Figures compiled from data tapes provided by the Administrative Office of the United States Courts; see  
(continued...)

cases challenging hiring practices outnumbered termination cases by 50% in 1966; but by 1985, this ratio was reversed by more than 6 to 1.<sup>39</sup>

The typical discharge case -- in which an elderly person, a woman or minority worker disputes a firing or layoff-- is fact specific and seldom implicates broader issues of federal law. Accordingly, the Committee believes such a case does not lay a great claim to a hearing before an Article III judge. In addition, the stakes in many discharge cases are so small that, even with the potential to recover attorney's fees under 42 U.S.C. 1988, claimants sometimes find it difficult to litigate in an Article III tribunal due to lack of money or counsel. (Because litigating in the district courts is time consuming and expensive, attorneys are less likely to agree to take close cases). The Committee's proposal, then, may open up a new avenue of recovery for those claimants who previously were forced to forego their claims.

The Committee therefore recommends that the EEOC be authorized on an experimental basis for a five year period to adjudicate wrongful discharge cases. Claimants should be permitted to elect between (1) a remedy before the agency with a right of appeal to the courts of appeals, or (2) an action in the district court with the same appeal rights as is provided under present law. The adjudication of similar cases by the National Labor Relations Board may provide a useful model.

The Committee's proposal, if implemented, may reduce the federal docket while affording some Title VII claimants a new procedure perhaps better suited to their needs. At the same time, no claimant who desires to litigate in an Article III court will be deprived of that right. Finally, the proposed procedure will free the federal courts to devote more time to more substantial and complicated federal cases.

Some members of the Committee disagree with the suggestion that litigation between private parties be transferred from an Article III court to an administrative agency. This shift would deprive parties of the

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38. (...continued)  
also Peter Siegelman, An Economic Analysis of Employment Discrimination Litigation (unpublished Ph.D. dissertation, Yale University 1989).

39. Id.

traditionally neutral judicial forum and instead substitutes an entity in the Executive Branch whose mission is not adjudication and one which is not organized for such a function. If it is desired to institute a more informal and less expensive method of resolving some of the smaller cases, then serious consideration should be given to resolving such claims through various forms of alternative dispute resolution under the aegis of the district court.

#### 4. FELA/JONES Act Jurisdiction

- Congress should substitute an administrative workers' compensation system for the FELA and the Jones Act. The development of state and federal workers' compensation schemes obviates the need for federal tort remedies for railway employees under the Federal Employers' Liability Act (FELA) and, similarly, for seamen under the Jones Act. Railway employees can be covered by the relevant state workers' compensation laws; seamen can be adequately covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).

The right to bring an ordinary tort claim in the federal courts is a historical anachronism rendered obsolete by the advent of workers' compensation schemes. In the case of railway employees, the Committee proposes to leave their remedy to the state workers' compensation systems -- as is the case for employees in other forms of interstate travel (bus, truck, airplane). However, the Supreme Court has held that the Constitution prohibits this solution for employees in maritime work. For this reason, Congress established a federal workers' compensation program for maritime workers in the Longshoremen's and Harbor Workers' Compensation Act. The Committee proposes to add seamen to those covered by this Act.

(a) FELA. Currently, the Federal Employers' Liability Act (FELA) allows a railway employee to recover damages for injury resulting from the negligence of the railway or its employees if the injury was sustained in interstate commerce.<sup>40</sup> The Supreme Court has held that the FELA provides to railway employees their exclusive

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40. 45 U.S.C. 51, et seq.

remedy for covered injuries.<sup>41</sup> This special federal protection for railway workers has its origin in the railways' importance to expansion in America and the federal railroad subsidization. When near the end of the 19th century public attention focused on the abuses of the railroads including the mistreatment of its workers, Congress responded by enacting precursor legislation in 1893 and 1906, and finally the FELA in 1908. The FELA abrogated for railroad employees the fellow-servant rule and the doctrine of assumption of risk, and replaced the contributory negligence defense with a rule of comparative negligence.

Were Congress to establish today a program to provide compensation for injured workers, it would undoubtedly turn to a workers' compensation program. In 1908, the year of the FELA enactment, however, no workers' compensation programs were in effect in any state, so it is not surprising that Congress did not consider an administrative workers' compensation system when it debated the FELA.<sup>42</sup>

(b) The Jones Act. With regard to maritime workers, for whom the federal government has from its beginnings assumed primary responsibility, Congress, in 1920, enacted the Jones Act,<sup>43</sup> which permits seamen injured in the course of employment to sue under the terms expressed in FELA. Prior to that enactment, Congress had determined that the federal actions for maintenance and cure and breach of the warranty of seaworthiness were inadequate and sought to improve the situation of injured seamen by enabling them to recover under the new state workers' compensation laws. The Supreme Court upset that scheme when it held that law unconstitutional on the ground that federal law must determine the claims of injured maritime workers and seamen.<sup>44</sup> The Jones Act thus supplements the seamen's traditional actions for

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41. *Wabash R.R. Co. v. Hayes*, 234 U.S. 86 (1914); *New York Central R.R. v. Winfield*, 244 U.S. 147 (1917); *Rogers v. Consolidated Rail Corp.*, 188 F. Supp. 835, 836-37 (N.D.N.Y. 1988).

42. See H. Friendly, *Federal Jurisdiction: A General View*, at 130 (1973).

43. 46 U.S.C. 688(a).

44. See, e.g., *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).



**maintenance and cure and for the breach of unseaworthiness.**

The advent of state workers' compensation schemes and the creation of a federal workers' compensation scheme in the Longshoremen's and Harbor Workers' Compensation Act (LHWCA)<sup>45</sup> have eliminated the need for the FELA and Jones Act remedies. When enacted, the latter two remedies were superior to the common law or statutory alternatives. Today, however, they are inferior to contemporary workers' compensation schemes, which are faster and less costly than a court action and do not require the claimant to prove negligence. Replacing the FELA and Jones Act with workers' compensation remedies will thus leave railway employees and seamen better off than they are now under the federal provisions.<sup>46</sup> Recovery under a workers' compensation scheme will also save the employees time, as well as attorneys' fees.

For these reasons, the Committee recommends that Congress substitute an administrative workers' compensation system for the FELA and Jones Act. With respect to seamen, we recommend that Congress amend the LHWCA to include seamen, thereby providing them with a federal workers' compensation scheme.

While eliminating FELA and Jones Act cases will not alone solve the caseload pressures in the federal courts, it should effect a noticeable reduction in the federal docket. In both 1987 and 1988, FELA and Jones Act cases accounted for 2% of the district courts' civil docket and 1% of the docket of the courts of appeals.<sup>47</sup>

45. 44 Stat. 1424 (1927), codified as amended at 33 U.S.C. 901. et seq.

46. While studies suggest that awards may be smaller under workers' compensation plans, these studies do not include those workers who are afforded no recovery because they are unable to prove negligence under FELA or similar statute.

47. See 1988 Annual Report of the Director of the Administrative Office of the United States Courts, Tables B-7, C-2 (hereafter "1988 AO Report"); 1987 Annual Report of the Director of the Administrative Office of the United States Courts, Tables B-7, C-2 (hereafter "1987 AO Report"). In 1988, there were 2,540 FELA cases and 2,413 Jones Act cases out of total district court civil filings of 239,634; in 1987, there were 2,436 FELA cases and

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Furthermore, these figures understate the impact of the FELA and the Jones Act -- at least at the district court level -- since FELA and Jones Act cases are more likely than the average federal filing to go to trial and to require a jury. In 1988, for example, FELA and Jones Act cases accounted for 4.6% of all civil trials and 7.5% of civil jury trials; in 1987, FELA and Jones Act cases constituted 5.3% of civil trials and 8.9% of civil jury trials.<sup>48</sup> While the number of cases affected is not great, repeal will ease the burden on the federal courts because FELA and Jones Act cases account for a disproportionate number of civil trials.

D. OTHER REFORMS

1. Habeas Corpus Report

- Congress should make no change regarding the standards for hearing the successive habeas corpus petitions of state prisoners under 28 U.S.C. § 2244.

The present rules governing the hearing of successive petitions were established by the U.S. Supreme Court in Sanders v. United States.<sup>49</sup> Under Sanders controlling weight may be given to the denial of a prior habeas corpus application only if (1) the same ground was presented and decided adversely to the petitioner, (2) the prior decision was on the merits, and (3) "the ends of justice" would not be served by reaching the merits of the

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47. (...continued)

2,939 Jones Act cases out of total district court civil filings of 238,982. At the appellate level, in 1988, there were 91 FELA appeals and 241 Jones Act appeals out of 32,686 total appeals, while in 1987, there were 80 FELA appeals and 245 Jones Act appeals out of 30,798 total appeals.

48. 1988 AO Report, Table C-8; 1987 AO Report, Table C-8. In 1988, there were 12,536 civil trials and 5,448 civil jury trials. Of these, 208 were FELA trials of which 183 were jury trials, and 369 were Jones Act trials of which 225 were jury trials. In 1987, there was a total of 13,162 civil trials of which 5,565 were jury trials. Of these, 250 were FELA trials of which 222 were jury trials, and 444 were Jones Act trials of which 274 were jury trials.

49. 373 U.S. 1 (1963).



subsequent application.<sup>50</sup> When grounds could have been but were not raised in an earlier petition, the merits must be reached unless the petitioner has deliberately abused the writ or motion remedy.<sup>51</sup>

These rules have been controversial from their inception. Some think that the "lax" standards espoused in Sanders resulted in a flood of successive petitions that needlessly undermined the states' interests in the finality of convictions. Early efforts to convince Congress to overrule Sanders failed, and instead the Court's result was codified.<sup>52</sup> A later effort to overrule Sanders by rule was similarly repudiated.<sup>53</sup> Efforts from within the Court have failed to obtain a majority.<sup>54</sup>

The Committee believes that no change is needed in this area. Many prisoners file more than one petition, but the chief source of these successive petitions -- changes in law that give rise to new claims or strengthen or revive old ones -- was recently eliminated by the Supreme Court's holdings in Teague v. Lane<sup>55</sup> and Penry v. Lynaugh.<sup>56</sup>

Of greater importance is the fact that the federal courts appear to have little difficulty disposing of those successive petitions that do come before them. The absence in the reports of decisions applying the Sanders criteria suggests (and anecdotal evidence confirms) that successive petitions are usually disposed of summarily and without reported opinion. In fact, the rules governing successive petitions appear to be applied in practice as if they incorporated a res judicata principle, so that successive petitions are turned aside routinely without significant expenditure of judicial effort. At the same

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50. Id. at 15.

51. Id. at 17-18.

52. 28 U.S.C. 2244; Larry W. Yackle, *Postconviction Remedies* 154 at 560 (1981).

53. See Rule Governing 2254 Cases in the United States District Court 9(b) (1976).

54. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

55. 109 S. Ct. 1060 (1989).

56. 109 S. Ct. 2934 (1989).

time, the broad formulation in terms of "abuse of the writ" and "the ends of justice" provides judges with sufficient flexibility to reach the merits in those cases that do appear to warrant further examination.

- Congress should make no change in the law respecting fact-finding procedures in habeas corpus cases.

The Committee also examined proposals that would have restricted further the power of district courts to hold evidentiary hearings. Here, too, we recommend no change. There are very few habeas corpus cases in which such hearings are held -- indeed, the rate of hearings is lower than for other classes of civil litigation. We believe existing standards are sufficiently strict.

In Townsend v. Sain,<sup>57</sup> the Supreme Court established when evidentiary hearings must be held to make independent findings of fact in habeas corpus cases. Soon thereafter, Congress amended 28 U.S.C. § 2254 and established new guidelines for when state court findings should be presumed correct. Considerable dissension over the law in this area has erupted; the chief impetus for reform seems to be the belief that federal courts should not waste valuable time reassessing something that has already been done in the state courts. Thus, advocates of reform have proposed restricting the availability of federal evidentiary hearings to those few cases in which the state court hearing was not "full and fair." Other reformers propose abolishing federal fact-finding altogether and making habeas corpus review a purely appellate procedure.

The Committee regards reform in this area as unnecessary at this time. Evidentiary hearings are held in very few habeas corpus cases. In both 1987 and 1988, only 1.1% of the petitions filed were terminated after a trial.<sup>58</sup> One reason so few hearings are held is that, in practice, most judges grant a hearing only if the state court proceedings were not full and fair. As a result, habeas corpus cases are less likely than other civil cases to go to trial. The data suggest that this is a direct result of the 1966 amendments. Accordingly, we see little need for congressional intervention at this time.

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57. 372 U.S. 293 (1963).

58. Annual Report of the Director of the Administrative Office, 1987-88.

- Congress should enact legislation regulating when a prisoner can base a habeas corpus petition on legal decisions rendered after his or her conviction became final. This legislation should provide that the federal courts entertain a petition for a writ of habeas corpus only if it presents a claim that was either controlled or "clearly foreshadowed" by existing Supreme Court precedent. The district court should have discretion to address the merits of the claim if that is necessary to determine whether a proper claim is presented. In addition, the legislation should recognize exceptions to this principle if the petitioner's claim is (1) that certain conduct or a certain kind of punishment is beyond the power of the criminal law to proscribe; (2) that the absence of a particular procedure substantially increases the likelihood of an erroneous verdict; or (3) the kind of claim that is not feasible to raise in an appeal from the judgment under which the applicant is in custody.

The question of retroactivity<sup>59</sup> has been a particularly sensitive issue in habeas corpus debate: if the state provides a trial that protected a defendant's constitutional rights as then understood, but a federal court later decides that the Constitution requires new or different procedures, should the state be required to release the prisoner and hold a second trial that complies with the new law? The Supreme Court addressed this issue last Term in two important cases, Teague v. Lane<sup>60</sup> and Penry v. Lynaugh.<sup>61</sup> Although the Court was split in both cases, the plurality agreed that "new constitutional rules of criminal procedure will not be applicable to those

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59. Last Term, in Teague v. Lane, 109 S. Ct. 1060 (1989), the Supreme Court held that a prisoner cannot seek habeas corpus relief based on changes in law occurring after his or her conviction. But the Court defined "new law" in vague terms and did not consider certain exceptions that may be necessary.

60. 109 S. Ct. 1060 (1989).

61. 109 S. Ct. 2934 (1989).

cases which have become final before the new rules are announced."<sup>62</sup>

Furthermore, a majority appears to agree that a rule is "new" if it was not "dictated by prior precedent" -- even if the rule was already followed in every state.<sup>63</sup> A "new rule," in other words, is any rule that has not been expressly ratified by the Supreme Court at the time the petitioner's conviction becomes final. The Court also held that retroactivity is a threshold inquiry that must be addressed before the court considers the merits.

Finally, the Court recognized two exceptions to this general prohibition: a petitioner may base a claim on "new law" if the claim is (1) that certain conduct or a certain kind of punishment is beyond the power of the criminal law to proscribe, or (2) that the absence of a particular procedure substantially diminishes the likelihood of an accurate verdict.<sup>64</sup>

Teague and Penry have dramatically changed the law of habeas corpus. One might perhaps argue that Congress should leave the courts to flesh out these issues before considering legislation. But Congress successfully codified several then-recent Supreme Court decisions in 1966;<sup>65</sup> congressional action in this context will be equally helpful.

Teague and Penry are based on the premise that the interests of the prisoner are at their weakest, and those of the state at their strongest, when the state court correctly applied law that has since been changed. In those cases, habeas corpus does not deter state courts from ignoring federal constitutional rights, since the failure to predict a change cannot realistically be deterred. The state court has done all that can fairly be asked of it by properly applying the law as it stood during the trial and appeal.

The desirability of limiting habeas corpus to claims based on law existing at the time a conviction becomes

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62. 109 S. Ct. at 1075, O'Connor, J. (plurality opinion), 1080, Stevens, J., joined by Blackmun, J.

63. 109 S. Ct. at 1070, O'Connor, J. (plurality opinion); 109 S. Ct. 2944.

64. 109 S. Ct. at 1075-77 (plurality opinion).

65. 28 U.S. C. Sec. 2254(d).



final depends on how one distinguishes between "misreading existing law" and "making new law." These categories blend together, yet this blurred line determines the scope of the state courts' duty to faithfully interpret and enforce the Constitution. There will often be sufficient uncertainty about the implications of particular Supreme Court decisions to insulate some state interpretations from federal habeas corpus review under Teague and Penry. Enough ambiguity will remain to insulate some state decisions from federal habeas corpus review.

Therefore, we suggest that Congress direct federal courts to hear a habeas corpus petition only if it presents a claim that was either controlled or "clearly foreshadowed" by existing Supreme Court precedent. This standard should require state courts to attend to case law developments without penalizing them for failing to be prescient. At the same time, we believe that this standard will not be too difficult to administer. Its precise contours will require further development through adjudication.

Second, it will often be difficult to separate the retroactivity issue from the merits. In addition, because the pleadings in habeas corpus cases are usually prepared by the inmate, they often require considerable interpretation by the reviewing court; issues that have been formulated cleanly when the case reaches the Supreme Court were seldom so in the lower courts. Therefore, we recommend that the decision whether to address the merits be left to the court's discretion. Exercising of this discretion should depend on whether the merits can be separated from the retroactivity question.

Finally, we agree with the two exceptions recognized in Teague and Penry, but we believe that Congress should create a third exception as well. Some claims are unlikely to be raised on direct appeal (e.g., ineffective assistance of counsel claims and claims that turn on facts that are discovered after appeal, such as Brady claims). After Teague and Penry, however, such claims can no longer be raised in habeas corpus proceedings if they argue for a change in the law. An exception to the rule of retroactivity is thus needed here for the same reason the Supreme Court has recognized an exception to the mootness doctrine for claims that are "capable of repetition yet evading review."

## 2. Sentencing Guidelines

### Introduction

In adopting the Sentencing Reform Act which authorized the promulgation of the Sentencing Guidelines, Congress sought to reduce unjustified sentencing disparity while retaining sufficient latitude to adjust to special factors in individual cases. The Guidelines have produced fundamental changes in the way criminal cases are handled in the federal courts.

In preparation for this report the Committee surveyed all district judges. The Committee was also given access to draft copies of the first two empirical studies on the implementation of the Guidelines. The Administrative Office provided data on appellate caseloads. Finally, the Federal Judicial Center provided information from its ongoing time study in the federal district courts.

As described more fully in our supporting memorandum, the Sentencing Guidelines have significantly increased the federal courts' workload. First, the Guidelines have increased the time necessary for the sentencing hearing. Ninety percent of the judges stated that the Guidelines have made sentencing more time-consuming. Over half said that the time required had increased at least 25%, and 30% of the judges reported that the time spent had increased at least 50%. The time necessary for the hearing at which guilty pleas are taken has also increased. Approximately 75% of the judges stated that the time for these hearings had increased, and more than a quarter stated that the time necessary had increased by 25 to 100%.

Even more importantly, the Guidelines have cast serious doubt on the continued ability of the federal courts to resolve a high percentage of criminal cases without trial. Most of the criminal caseload -- like the civil caseload -- is terminated by settlement, not trial; and the Federal Rules of Criminal Procedure acknowledge the legitimacy of plea bargaining, subject to judicial oversight. The Guidelines are disrupting the plea negotiation process. More than 70% of the judges surveyed stated that the Guidelines had reduced the incentives that may be provided to induce a defendant to plead guilty, and half stated that the Guidelines had decreased the percentage of guilty pleas in their current criminal caseload. This figure is highly significant because the federal system is so heavily dependent on plea bargaining. Traditionally 85-90% of the convictions are the result of



guilty pleas, most of which are part of a plea bargain. The empirical studies confirm that the Guidelines are in fact hindering plea bargaining.

How can this picture be reconciled with the data provided by the Sentencing Commission, which has stated that the system is working well, achieving a high rate of compliance as well as a 90.2% guilty plea rate for this first 17 months that the Guidelines were in effect? The empirical studies provide a disturbing answer: bargaining is being forced outside the system. Prosecutors and defense counsel are evading and manipulating the system to induce the pleas necessary to keep the system afloat. Discretion is still being exercised, but it is invisible and no longer subject to judicial review.

The proposals that follow are intended to ensure that the federal courts can continue to process their criminal caseload with the available resources while still adhering to the central principles of the Sentencing Reform Act: the establishment of sentencing guidelines or ranges to guide the exercise and review of judicial discretion in order to avoid unwarranted sentence disparities, the requirement that the sentencing judge explain on the record the reason for the sentence and for any deviation from the applicable guidelines, and the authorization of appeals of sentences by both the defendant and the government.

- Congress should amend the Sentencing Reform Act to state clearly that the Guidelines promulgated by the Sentencing Commission are general standards regarding the appropriate sentence in the typical case, not compulsory rules. Although the Guidelines should identify the presumptive sentence, the trial judge should have general authority to select a sentence outside the range prescribed by the Guidelines, subject to appellate review for abuse of discretion. The exercise of this discretion may be based upon factors such as an appropriate plea bargain or the defendant's personal characteristics and history.

A degree of flexibility in the federal sentencing system is necessary to acknowledge real differences between cases and to process the burgeoning criminal caseload with the resources at hand. As implemented, the Guidelines promulgated by the Sentencing Commission ("Guidelines") do not provide sufficient flexibility. They unduly tie the hands of both prosecutors and sentencing judges in a manner that not only causes

injustices in individual cases but actually threatens the federal courts' ability to process their cases without a huge infusion of resources to take many more cases to trial.

The Guidelines as implemented do not give the sentencing judge clear authority to adjust the sentence in the individual case in light of all pertinent factors. For example, the Guidelines do not authorize the court to adjust the sentence in light of the defendant's personal history. Yet, it works an injustice to give the same sentence to two defendants, each of whom drives cocaine across the border, when one defendant is a 19 year-old gang member, and the other a 39 year-old father of three whose minimum wage job does not provide health insurance covering the expensive care required for his premature infant. Another area where judges need greater leeway is in cases where the defendant pleads guilty. Despite the importance of plea bargaining in the federal system -- where 85-90% of the convictions traditionally result from guilty pleas -- the Guidelines do not clearly state whether the judge has the authority to approve a sentence outside the Guidelines in accepting a plea bargain.

The Guidelines also tie the hands of the prosecutor by limiting the concessions that can be offered to induce guilty pleas.

The Guidelines make no provision for modifying a sentence because of caseload pressures in a particular district or of factual or legal weaknesses in the government's case, all of which affect the prosecutor's willingness and ability to take a case to trial. Furthermore, the Guidelines regarding the defendant's acceptance of responsibility and provision of substantial assistance to the government neither individually nor collectively meet this need.

The third flaw in the system is an outgrowth of the first two. Instead of achieving the Congressional purpose of limiting and regulating sentencing discretion, the Guidelines have actually had the perverse effect of transferring discretion from the court to the prosecutor, who then exercises the discretion outside the system. The Guidelines have limited federal prosecutors' formal authority to offer concessions, but provided no additional resources to take more cases to trial. The rapid increase in the caseload compounds the problem. It appears that some prosecutors (and some defense counsel), in turn, have responded by evading and manipulating the Guidelines in order to induce the pleas necessary to keep the system afloat. These practices occur regularly,

despite the fact that many of them contravene the Attorney General's instructions to federal prosecutors, which state that departures from the Guidelines "should be openly identified rather than hidden between the lines of a plea agreement."

The Committee's survey of district judges supports these observations. The responses indicate that greater flexibility is needed to allow courts to tailor sentences in individual cases, and that the reduction in sentencing concessions has made it more difficult to negotiate guilty pleas.

It is crucial to provide the flexibility necessary to induce guilty pleas in appropriate cases. If the rate of plea bargaining decreases, the judicial system will require a huge increase in resources. Since nearly 85-90% of the convictions normally result from guilty pleas, only 10-15% go to trial; even a 5% reduction in guilty pleas would mean a 33-50% increase in the number of trials. This would require large expenditures for additional judges, court personnel, prosecutors, federal defenders, jurors, etc.

On the other hand, it is also important to subject the sentencing concessions in guilty plea cases to judicial oversight under the framework of the Guidelines and the Federal Rules of Criminal Procedure. The present system forces most of this discretion outside the Guidelines, where it is invisible and unreviewable.

The best solution is to amend the statute to clarify the latitude available to the sentencing court. The court should have clear statutory authority to consider a plea agreement in light of the sentence prescribed under the Guidelines and to accept the agreement if the concessions are appropriate under the circumstances. This change would make it possible for prosecutors to follow the Attorney General's directive to reveal openly the proposed departure from the Guidelines, but still offer appropriate inducements to encourage a sufficient number of plea agreements to process the caseload with available resources. The statute should make it clear that the court has discretion to accept an appropriate plea agreement specifying a sentence under Fed. R. Crim. P. 11(e)(1)(C), as well as appropriate agreements under 11(e)(1)(A) and (B). The statute should also give the court latitude to consider other factors, particularly the defendant's personal history. Finally, it is desirable for the courts to have greater leeway to deal with special problems that occasionally arise under particular Guidelines provisions.

The Committee is not seeking a return to the old regime of standardless and unreviewable sentencing discretion, which was criticized for producing unjustified disparity. The Guidelines calculation would establish the heartland -- the sentence for the usual case -- and the sentencing judge would have to state reasons in any case in which he or she deviated from that standard. Any sentence outside the Guidelines would be subject to appellate review for abuse of discretion, with the Guidelines providing the appellate court with a benchmark against which to review the sentence.

Indeed, a review of the literature reveals that some commentators take the view that the discretion we believe to be so crucial is already present in the statute and the Guidelines, though this fact has not generally been recognized by the courts and the litigants.<sup>66</sup> If these commentators are correct, and the amendment we propose will not alter the substance of the law, it is still needed for purposes of clarification.

- Congress should repeal the mandatory minimum sentences now in effect and direct the Sentencing Commission to reconsider the Guidelines applicable to the affected offenses.

Mandatory minimum sentences are intended to control sentencing discretion. Although they perform this function, they do so in a way that is far more rigid than the present Guidelines system, which controls discretion but also tailors sentences to the specific facts of an offense, considering whether a weapon was used, whether the defendant was the instigator and leader or a follower, the nature of the injury, if any, to the victim, etc. We agree with the recommendation of the Judicial Conference Committee on Criminal Law and Probation Administration that the mandatory minimum sentence statutes should be repealed now that the Guideline system is in place. Mandatory minimum sentence provisions inhibit the efforts

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66. See, e.g., Breyer, The Federal Sentencing Guidelines and the Key Compromises on Which They Rest, 17 Hofstra L. Rev. 1 (1988) (court may accept plea bargain that rests on sentence outside guidelines limits); Walker, Below-Guidelines Plea Bargains, 2 Fed. Sent. R. 68 (1989) (same); Weinstein, A Trial Judge's First Impression of the Federal Sentencing Guidelines, 52 Alb. L. Rev. 1, 10-12 (1987) (court can depart on the basis of the defendant's personal history).



of the Sentencing Commission to fashion a comprehensive and rational sentencing system. Indeed, Senator Kennedy, the co-sponsor of the Sentencing Reform Act, has recognized that mandatory minimums are inconsistent with the Guidelines system.<sup>67</sup>

Moreover, mandatory minimum sentences are seriously impeding the efforts of both prosecutors and judges to handle the growing criminal caseload. When lengthy mandatory minimum sentences are applicable, it is difficult to provide any incentive that will induce a defendant to plead guilty, and this is causing increasingly serious problems in many districts. Courts with heavy criminal caseloads depend upon disposing of 85-90% of the cases without a trial. Many of the district court judges who responded to our survey added comments emphasizing the negative effects of mandatory minimum provisions.

Once the mandatory minimum sentence statutes are repealed, the Sentencing Commission should reconsider the Guidelines applicable to the relevant offenses. At present the Guidelines use the mandatory minimum as the floor for those offenses. Given the huge projected increase in the federal prison population, it is important for the Commission to reassess the appropriate Guidelines for these offenses absent the driving force of the statutory minimums.<sup>68</sup>

- The Advisory Committee on the Federal Rules of Criminal Procedure should propose amendments to Rule 35(b) to: (a) authorize the district court to correct an error in the sentence on the motion of either party made within 120 days of imposition of sentence, and (b) authorize the district court to amend a sentence based upon newly discovered facts on motion of the defendant within 120 days of imposition of sentence.

Given the complexity of the Guidelines and the unfamiliarity of both the court and counsel, numerous errors occur in sentencing. Some of these errors are

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67. See Mandatory Minimum Sentences in the Omnibus Drug Bill, 1 Fed. Sent. R. 350 et seq. (1989) (reprinting statements from the Congressional Record).

68. See generally. Resolution of the Judicial Conference Committee on Criminal Law and Probation Administration, adopted at its meeting June 21-23, 1989.

discovered quickly, but there is no clear procedure to remedy the error short of an appeal or habeas action.

We believe the district court should have the authority to correct sentencing errors if they are discovered promptly. It is not desirable to require the parties to take an appeal or to bring a habeas action.

The second portion of this proposal may present more problems and will require careful limitation to prevent abuse. On balance, however, it is our recommendation that authority should be available to amend a sentence based upon new factual information provided by the defendant. To guard against abuse, this authority should be limited to information that was not known to the defendant at the time of sentencing. A defendant's acceptance of responsibility (see Guidelines 3E1.1) after sentence would not qualify as a basis for a reduction under this provision. It would also be desirable for the Advisory Committee's notes to emphasize the narrow construction envisioned for this provision.

Given the need for finality, both proposals should be limited to motions made within 120 days after sentencing. Indeed, in light of the need for finality the Advisory Committee might wish to consider whether to state the time period within which a ruling on these motions should be made.

- The Advisory Committee on the Rules of Criminal Procedure should propose an amendment to Rule 32(c)(3)(D) stating that the district court has the authority to determine before or during the sentencing hearing that it will not be necessary to resolve a disputed factual matter that is arguably relevant to sentencing.

This amendment could substantially shorten sentencing hearings in many cases. At present, the district judge and counsel not infrequently find themselves involved in lengthy hearings on points that are technically relevant under the Guidelines analysis, but which the court recognizes will not affect the sentence. For example, although prior criminal history is relevant, the court may conclude that the validity of one of many prior convictions will not affect the sentence. Similarly, even if the court has discretion to consider the defendant's personal history, the court may feel that it is not necessary to determine whether the defendant in fact qualified for his GED certificate.



The sentencing court should be given explicit authority to avoid conducting a hearing on such issues. Rule 32(c)(3)(D) presently suggests that authority of this nature exists when the parties allege that there are factual inaccuracies in the presentence report. This authority should be made explicit.

Rulings of this nature could be made subject to appellate review to ensure that they are restricted to the limited purpose envisioned here.

- The Advisory Committee on the Federal Rules of Criminal Procedure should propose an amendment to Rule 32 requiring the sentencing judge to advise the parties of the Guidelines range under consideration and whether the court is considering departure prior to or at the start of the sentencing hearing.

Requiring the court to advise the parties of a tentative position would serve two valuable functions. First, it would provide notice to the defendant, which some courts have already concluded is required under the due process clause. Adopting this procedure would eliminate further constitutional litigation on this point. Second, requiring the court to state its tentative position may shorten the sentencing hearing by focusing the parties' presentations.

- Congress should authorize rotating special appellate panels composed of two district judges and one appellate judge in each circuit to hear appeals raising only sentencing issues.

The Sentencing Guidelines are imposing a substantial new burden on the courts of appeals a time when the courts' resources are stretched to the breaking point. Statistics provided by the Administrative Office of the United States Courts reveal that for the year ending June 30, 1989, 83% of post-Guidelines criminal appeals raised a sentencing issue. A significant portion of those cases -- 32% -- raised only a sentencing issue. Most of those were probably guilty plea cases that would not have been subject to appeal before the adoption of the Guidelines.

The proposed panels would ease the burden on the courts of appeals and allow the district judges, who are the most familiar with the new Guidelines, to help shape the precedents interpreting and applying them. The presence of one circuit judge should be enough to ensure continuity and liaison with the court of appeals. Although this proposal will require district judges to

perform a new function, the task will be so widely shared that the burden on individual judges will not be too great.

- Congress and the Sentencing Commission should reevaluate the process by which new Guidelines and amendments to Guidelines become law.

At present, pursuant to 28 U.S.C. § 994(p), Guidelines promulgated by the Sentencing Commission automatically become effective 180 days after submission to Congress. The current scheme is parallel to that used for amendments to the Federal Rules of Civil and Criminal Procedure.

The Sentencing Commission's exercise of its authority to promulgate amendments has recently been criticized both by a member of the Commission itself and by its special counsel. Former Commissioner Michael K. Block has written that some of the changes submitted to Congress in May 1989 were not supported by an adequate empirical analysis, and "that the Commission's process for generating Guideline amendments is developing in such a way as to hinder rational policy making."<sup>69</sup> Commissioner Block argues that the increase in the fraud Guidelines levels was based on no more than the Commission's erroneous belief that other statutory changes had sent a signal to the Commission to increase the penalties for fraud. Special Counsel to the Sentencing Commission Ronald Weich has expressed concern that the emergency amendment procedures are especially susceptible to political pressure.<sup>70</sup>

Whatever the merits of recent amendments proposed by the Sentencing Commission, Congress and the Commission should reevaluate the process by which new Guidelines and amendments become law. Given the extraordinary impact that the Guidelines have upon both the federal court system and individual defendants, one question that should be explored is whether positive Congressional action should be necessary before a new Guideline or an amendment becomes law.

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69. Block, Emerging Problems in the Sentencing Commission's Approach to Guideline Amendments, 1 Fed. Sent. R. 451 (1989).

70. Weich, Emergency Amendments, 2 Fed. Sent. R. 71 (1989).

### 3. Pendant Party Jurisdiction

- Congress should authorize the federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base but with claims related to the same "transaction or occurrence."

Last Term, in Finley v. United States,<sup>71</sup> the Supreme Court limited the federal courts' power to hear pendent party claims. Moreover, the Court's holding -- that express statutory authority is required for a federal court to exercise jurisdiction over parties with only state-law claims-- can be argued to extend beyond the facts of Finley to preclude any exercise of pendent party jurisdiction. Admittedly, reducing pendent-party jurisdiction will decrease the federal caseload - most certainly a goal of this Committee's work - but the Committee believes that caseload reduction brought about through this method is undesirable. Eliminating pendent-party jurisdiction will remove a random selection of claims from the federal court with no consideration for the need or desirability for federal jurisdiction. If there is to be docket reduction, it should be based on an evaluation of which claims are least appropriate for resolution in federal courts; the fortuity of being coupled with a state law claim does not reflect such concerns.

Thus, under Finley, absent a congressional grant of pendent-party jurisdiction to the federal courts, a litigant must choose between (1) splitting his claims and bringing duplicative actions in state and federal courts; (2) abandoning one of his claims altogether; or (3) filing the entire case in the state court, thus delegating the determination of federal issues to the state courts. The first alternative wastes judicial resources. The second alternative is unfair to the litigants. The third forces litigants to bring a wide variety of federal claims into the state courts.

Accordingly, the Committee recommends that Congress overrule the Finley decision by codifying earlier case law respecting pendent claim jurisdiction and explicitly broadening its application to permit exercise of pendent-party jurisdiction under similar circumstances.<sup>72</sup> Congress should authorize federal courts to hear any claim

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71. 109 S. Ct. 2003 (1989).

72. United Mine Workers v. Gibbs, 383 U.S. 715 (1970).

arising out of the same "transaction or occurrence" as a claim within federal jurisdiction, including claims that require the joinder of additional parties. In order to minimize friction between state and federal courts, however, Congress should direct federal courts to dismiss state claims if these claims predominate or if they present novel or complex questions of state law.

This recommendation may be affected by amendments to the civil RICO statute which has been used in some instances as a device to bring predominately state issues into the federal courts.

**4. Elimination of Unnecessary Litigation  
Through Statutory, Rule and Practice Measures**

**(a) Statutes of Limitations for Federal Claims**

- ▶ Congress should (1) adopt limitations periods for major congressionally-created federal claims that presently lack such periods, and (2) adopt fallback limitations periods for federal claims (such as those implied by the courts) not explicitly created by Congress and for any other federal claim not specifically covered by a limitations provision. Before the adoption of such legislation, existing federal statutes of limitations should be surveyed for any guidance they may provide as to lengths of periods for various types of actions, and to determine whether existing limitations provisions are inconsistent enough to warrant revision.

At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. This approach imposes undesirable burdens on the federal courts for several reasons. The borrowing process can be difficult for judges and lawyers because often it is unclear which state law claim is most analogous. The absence of clear answers to borrowing questions imposes uncertainty on litigants, and reliance on varying state laws results in undesirable variance among the federal courts. It also disrupts the development of federal doctrine on the tolling of limitations periods.

Borrowing, while defensible as a decisional approach in the absence of legislation, appears to lack defenders or persuasive support as a matter of policy. Uniformity of the limitations period between related state and federal claims, which the present regime may provide, is a relatively minor benefit, especially given the



uncertainty surrounding which limitations period will be held analogous and governing and the possibility of filing in different states that may apply different limitations periods. The New York State Bar Association recently has endorsed adoption of federal limitations periods. Although some difficulty might arise in fashioning a fair set of limitations periods, the Committee nonetheless recommends that the effort be made.<sup>73</sup>

(b) Venue

- Congress should replace the present reference in the general venue statute, 28 U.S.C. § 1391(a), to venue in "the judicial district . . . in which the claim arose," with "any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." If Congress should retain diversity jurisdiction, it should also eliminate venue in diversity cases in the district where all plaintiffs reside, thus ending anomalous dissimilarity in treatment between federal question and diversity cases.

The present general venue statute includes "the judicial district . . . in which the claim arose" (emphasis added) as one basis of venue in federal civil actions. The implication that there can be only one such district is "inevitably litigation-breeding," 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure 3806, at 45 (2d ed. 1986), concerning which of the possibly several district involved in a multi-forum transaction is the one "in which the claim arose." The present language comes from a 1966 liberalization of the venue statute, but it "would have been . . . better still . . . to have followed the lead of the American Law Institute," id. at 46-47, which in its Study of the Division of Jurisdiction Between State and Federal Courts (1969) recommended the exact language used in the black letter proposal above. Congress itself used this same

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73. The Committee does not recommend abandonment of the sometimes troublesome fraudulent concealment doctrine, which plaintiffs can use to argue for effective extension of the limitations period. Basic fairness argues strongly against rewarding wrongdoers who succeed in concealing their misdeeds long enough, and the difficulties of making out a case of fraudulent concealment may protect against widespread abuse.

phrasing in a 1976 amendment concerning venue in actions against foreign states, 28 U.S.C. § 1391(f)(1). The Supreme Court's principal interpretation of the "in which the claim arose" clause, in Leroy v. Great Western United Corp., 443 U.S. 1973 (1979), has lead to complex approaches and inconsistent rulings in the lower federal courts.

If Congress revisits the general venue statute, it should also eliminate the century-old anomaly providing for venue in diversity but not federal question cases "in the judicial district where all plaintiffs . . . reside." No good historical or functional reason appears to exist for this distinction which perversely favors home-state plaintiffs in diversity cases.<sup>74</sup> The ALI Study, *supra*, proposed the elimination of plaintiffs' residence as a basis for venue and a provision for venue in a judicial district wherein "any defendant resides, if all defendants reside in the same State."

#### (c) Separate-Claim Removal

- If Congress retains the general diversity of citizenship jurisdiction, it should repeal 28 U.S.C. § 1441(c) concerning removal of separate and independent claims.

Section 1441(c) of the Judicial Code permits removal of a "separate and independent claim or cause of action" that would have been "removable if sued upon alone" when "joined with one or more otherwise non-removable claims or causes of action." A principal purpose of this troublesome provision is to keep a defendant's right of removal to federal court alive when a state court plaintiff joins an unrelated, non-removable claim. Most commonly, such situations arise in diversity cases when the separate claim is against another, nondiverse party. (In the small number of federal question cases in which the statute might apply, it can work fairly well as a backstop to the general removal provisions, 1441(a) - (b) -- hence the conditional nature of the proposal.)

For complex reasons, however, the statute as a paradigm of a failed procedural provision, occasioning much litigation apart from the merits as defendants try and mostly fail to qualify for separate-claim removal. As one court has said of 1441(c), this field "luxuriates in a riotous uncertainty." The ratio of successful uses of

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74. See C. Wright, *The Law of Federal Courts* 42, at 240-41 (4th ed. 1983).



the provision to defeated attempts, often after complex argument in federal district or even appellate court before remand to state court, appears to be distressingly low. "[T]he statute's utility is greatly outweighed by the confusion it has engendered." C. Wright, *The Law of Federal Courts* 39, at 225 (4th ed. 1983).

#### (d) Confidentiality of Discovery Materials

- ▶ Federal courts should continue to use protective orders to preserve the confidentiality of sensitive materials in order to expedite discovery. In order to avoid duplicative discovery, however, courts that enter such orders should freely modify them to permit access to discovered information by litigants in other cases unless such information would not be discoverable in those cases. Access for other litigants to relevant, otherwise discoverable information should be denied only for especially good cause (e.g., protection of confidentiality of settlement discussions or statements made in voluntary alternative dispute resolution proceedings), but may be limited (as by requiring specific requests rather than opening files to later litigants) when all parties to the first litigation oppose access or confidentiality was a condition of settlement.

Particularly in complex litigation, confidentiality of materials produced through discovery can assume substantial importance. First, when (as is often true) litigation makes inquiry into sensitive materials, assuring confidentiality by using protective orders may facilitate the discovery process by reducing concern for publicity as a possible reason to resist discovery. Second, when the same issues arise in several related cases, sharing of information can make litigation more accurate and less expensive by avoiding need for duplication of effort -- unless defendants feel a need to resist the sharing. In some cases, such as those involving product safety, there is also a public interest in availability of information.

It is not easy to generalize about how to strike appropriate balances in the many different kinds of situations in which there will arise questions of confidentiality of sensitive discovery information that could be of value to other litigants, regulatory authorities, and the public. Denial of general access by protective orders can serve legitimate interests, such as the protection of trade secrets, as well as easing the

discovery process. It is, of course, basic that confidentiality orders in one litigation cannot deny to different litigants information that they would otherwise have been able to obtain by regular discovery processes. But there are public as well as private interests in expediting proceedings and settlement; consequently, not all information revealed in the course of one litigation should automatically be open to the public or to other litigants who might find it useful. Such legitimate reasons for confidentiality raise concern about some aspects of H.R. 129, proposed legislation that would limit protective orders in product liability cases; the supporting memorandum by Associate Reporter Marcus discusses the bill and recommends against changing legislatively, for one class of cases, present general practice -- which does often permit access already.<sup>75</sup>

(e) Case Management

- ▶ The Committee encourages (a) the "tracking" of cases by level of complexity, (b) early judicial involvement to control the pace and cost of complex cases, (c) staged discovery, and (d) the training of judges in appropriate techniques of case management.

Over the past 10 to 15 years, district courts have expedited litigation by taking an increasingly active role in the management of litigation. These efforts were facilitated by the 1983 amendment to Federal Rule of Civil Procedure 16, and should be continued.

More specifically, a recently issued report by a task force of the Brookings Institution and the Foundation for Change extensively studied means of reducing delay and cost in civil litigation. Among the most promising measures identified was "tracking" or "differentiated case management," like that successfully used in New Jersey to classify cases as simple, standard, or complex. Depending on the classification, different time limits for discovery and trial can apply; and complex or hotly contested cases can call for judicial management measures such as early status conferences, targets for completion of various pretrial stages, and close supervision of discovery, including prompt decisions on discovery issues by one judicial officer primarily responsible for discovery

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75. For a general discussion of this area, see Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1 (1983).

matters in the case. Case tracking programs should be so organized that significant decisions remain in the hands of judicial officers and that sufficient flexibility exists to accommodate the needs of individual cases. The growing importance of such judicial case management techniques calls for increased judicial education in the choice and use of such techniques to eliminate unnecessary cost and delay while maintaining judicial impartiality. Given the recent work of the Task Force, the Committee does not attempt to duplicate its work or coverage, but its recommendations deserve careful consideration.<sup>76</sup>

(f) Use of Oral Findings and  
Conclusions in Bench Trials

- ▶ District judges should take advantage of appropriate opportunities to have their findings of fact and conclusions of law in bench trials "stated orally and recorded in open court following the close of the evidence," as authorized by the 1983 amendment to Federal Rule of Civil Procedure 52(a). The Federal Judicial Center should include in its programs for district judges instruction on the use of the parties' proposed findings of fact and conclusions of law.

Although the objectives of the 1983 amendment to Rule 52(a) were to "lighten the burden on the trial court in preparing findings in nonjury cases" and to "reduce the number of published district court opinions that embrace written findings," too often nonjury cases remain undecided for considerable lengths of time after the end of court hearings. Especially when a case seems unlikely to be appealed, oral findings and conclusions can speed decision making. Greater use of such findings after the close of the evidence can help ensure that decisions are made when the facts and issues are fresh in the judge's mind; furthermore, dialogue with counsel on the spot may sharpen the facts and issues when necessary. In the event of an appeal, these findings or opinions can provide more guidance for the appellate court than the traditional,

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76. Brookings Institution, *Justice for All: Reducing Costs and Delay in Civil Litigation* (1989); Litan, *Speeding Up Civil Justice*, 73 *Judicature* 162 (1989); Bakke & Solomon, *Case Differentiation: An Approach to Individualized Case Management*, 73 *Judicature* 17 (1989). Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 *Calif. L. Rev.* 770 (1981)

separately numbered, written findings. Judges could invite proposed findings and conclusions in advance of a decision to be rendered orally.

The Committee does not recommend the practice of rendering limited oral or written findings to be elaborated on in case of appeal. On balance, the practice seems too likely to complicate losing parties' decision whether to appeal, to encourage needless notices of appeal as a way of getting clearer statements of findings and conclusions, to encumber the appellate process with delays pending filing of Rule 52(a) findings and conclusions after notice of appeal; District judges can, of course, edit and polish recorded oral findings and conclusions to be issued with the formal judgment order. See, e.g., In re Jones, 768 F.2d 923, 931-32 (7th Cir. 1985) (Posner, J., concurring).<sup>77</sup>

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77. Christensen, A Modest Proposal for Immeasurable Improvement, 64 A.B.A. J. 693 (1978).

### III. Internal Improvements in the Judicial Branch

#### A. Management

##### 1. A CHANCELLOR OF THE U.S. COURTS

- ▶ The Committee endorses the suggestion of the Chief Justice that he appoint a committee in 1990 or 1991 to review the functioning of the current Judicial Conference leadership structure, including consideration of the "Chancellor" concept proposed by the A.B.A.

The American Bar Association recommends the creation of a position, perhaps held by a federal judge appointed by the Chief Justice, who would function as the administrative head of the judiciary. Sometimes termed for brevity, "chancellor," this official would exercise on a full-time basis many of the powers now exercised by the Chief Justice (and often recently delegated by him to the Chairman of the Executive Committee of the Judicial Conference as well as the Director of the Administrative Office).

The Committee has conferred with the Chief Justice and concurs with his suggestion that the chancellor concept and alternatives be considered by a committee that he will appoint in 1990 or 1991 to review the operations of the Judicial Conference leadership structure as established in 1987. Thus, the Committee feels that it would be premature to make recommendations for further specific changes at this time.

While agreeing that consideration of the Chancellor concept is appropriate, some Committee members believe that a viable alternative to the creation of a chancellor would be the statutory authorization of the new Executive Committee structure within the Judicial Conference. It was suggested that the chair of the Executive Committee could fulfill most of the duties of the chancellor without formally altering the responsibilities of Chief Justice. On the other hand, the pressures of short and long-range planning, testifying before Congress, and leadership in general, may have reached a point where full-time service by a judge, rather than the part-time service of the Executive Committee Chair, is required.

Whether to adopt the Chancellor concept or a different alternative is a matter that will require very careful and extended consideration by knowledgeable persons under the aegis of the Chief Justice.



## **2. THE JUDICIAL CONFERENCE OF THE UNITED STATES**

- ▶ **The ability of the Judicial Conference to issue rules and regulations for the federal judiciary should be recognized by statute.**

At present, the Judicial Conference is authorized to oversee the Administrative Office but has no specific grant of power; only the separate circuit councils possess statutory administrative powers.<sup>78</sup> Yet, the Conference frequently and appropriately adopts directives that effectively regulate administrative matters within the federal court system. Because of its statutory oversight of the Administrative Office, and because of the latter's statutory powers, these directives are likely to have implied legal foundation, but some directives could be questioned. The Judicial Conference's rule-making function in the court administration area is deserving of explicit statutory acknowledgement.

## **3. JUDICIAL COUNCILS**

- ▶ **The Judicial Conference should determine whether the composition of judicial councils should be prescribed by statute.**
- ▶ **Judicial Councils should conduct long-range local planning on administrative matters, especially in light of present trends towards decentralization of budgeting, administration, and space and facilities planning.**

The judicial councils of the circuits are valuable to the administration of the judiciary. Yet, the Committee is concerned about the variations in district judge representation. The Committee therefore encourages the Judicial Conference: (1) to determine whether the composition of judicial councils should be prescribed by statute in a nationally uniform manner, and (2) to work for any necessary statutory changes.

The Committee also wishes to note that long-range planning by the judicial councils, as opposed to reactive planning, is especially desirable in light of present

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78. 28 U.S.C. 332(d)(1).



trends towards decentralization of budgeting,<sup>79</sup> administration, and space and facilities planning.<sup>80</sup> The Committee urges a shift in focus (from day-to-day planning to long-range planning) by all judicial councils.

#### **4. MANAGEMENT STRUCTURE WITHIN INDIVIDUAL COURTS**

- ▶ The Federal Judicial Center should conduct a study regarding the role of chief judges, the interrelationship between court units, and the assignment of judges. Topics should include:
  - (1) The authority to assign judges at specific stations within the district and circuit, and to obtain outside judicial assistance when needed;
  - (2) Continuation and possible expansion or contraction of the district executive program, including consideration of the chain of command between the district executive and the clerk; and
  - (3) The relationship between the district court clerk/executive and the bankruptcy court, probation office and pretrial service office.
- ▶ Courts should have the option to change the title "Clerk of Court" to "District Court Administrator" and future appointments should be made on a competitive basis.
- ▶ The current method of chief judge selection by seniority should be continued.
- ▶ The Federal Judicial Center's program being developed to provide extensive training to chief judges should be strongly supported with consideration given also to training the chief judge's successor.

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79. See, e.g., the Committee's recommendation on the decentralization of budgeting.

80. See proposal regarding space and facilities planning.

The problems of administration in an era of burgeoning caseload are such that professional staff assistance is a necessity. Creation of the office of circuit executive two decades ago reflected the growing awareness of the need for professional court administration. The ultimate test of professionalism is, of course, performance -- which turns as much or more on dedication, experience and talent as on special training.

Still, the dedicated professional court administrator, skilled in modern management and familiar with the uses of automation, is the key to the efficacy of our courts. No court, in this era, can afford to hire key administrative personnel without a careful search and evaluation process designed to promote, or obtain from outside, the most qualified person. All courts should advertise and open up key administrative positions on a fully competitive basis.

**(a) District Executive Program.**

A district executive pilot program, patterned loosely after the circuit executive role, has been instituted in eight metropolitan district courts. This program has had mixed reviews. In the nation's largest district court, the Southern District of New York, the office reportedly has worked well. In other locations friction has erupted between the clerks of court and those occupying this new, largely undefined function.

Superimposing a new and undefined function over, or side by side with, an existing function is bound to create a power struggle. It may be that only particularly large courts can support the two separate offices. Much of this problem, we think, can be averted by upgrading existing functions. Clerks should be hired, as is increasingly the case, on the basis of management merit and the ability to handle a broad range of court management functions. In larger courts, the supervision of the clerk's office can be one of several functions that the clerk "administrator" oversees. To accomplish this end, a title change, as discussed below, is desirable to reflect an increased range of responsibility.

**(b) Change in the title of "Clerk of the Court" to that of "District Court Administrator."**

The title of "clerk" does not adequately convey the multi-faceted management role that is increasingly expected of today's clerks of court. By emphasizing the administrative role of clerks, administrative functions may be enhanced and the friction between competing offices

avoided. The change of title should be optional since in some districts the older title may still be preferred.

### **(c) Training of Chief Judges.**

The Committee has examined the method of chief judge selection and has concluded that the current seniority system, while not faultless, operates well in practice. The current method of chief judge selection is preferable to any other under consideration. Seniority of course, does not ensure management ability, but prospective chief judges can, and sometimes should, decline the position or can choose to delegate some responsibility to other judges.

The Committee concurs with the Executive Committee of the Judicial Conference that action should be taken to ensure that chief judges and administrators are well-trained and competent. As courts become increasingly busy, and as programs such as budget decentralization attract more interest, it will become ever more critical to provide able administration. Chief judges need not, and probably should not, be micro-managers. Enlisting the aid of able professional staff and encouraging their colleagues to share in the running of the court is a most important skill. Still, the chief judges' leadership can spell the difference between a successful and an unsuccessful court operation. A well-designed program to train chief judges for their responsibilities should be implemented. We think it would be desirable, too, to provide preparatory training for the successor to the chief judge.

## **5. ADMINISTRATIVE OFFICE OF THE U.S. COURTS**

- ▶ **The Administrative Office should continue its studies regarding decentralized budgeting, procurement, and other administrative matters.**

Currently, each court receives a categorized budget, with allocations for personnel, furniture, equipment, etc. Unfortunately, the courts are limited in the ability to transfer among the categories as their needs dictate. If the budget were decentralized, however, the district courts and courts of appeals would have greater authority to determine how to allocate available funds. The Committee believes this greater flexibility is appropriate both to meet the changing or unique circumstances of the local courts and, accordingly, urges the Administrative Office to allow each court a voice in establishing its own budgetary priorities.

- **The Administrative Office should encourage greater understanding and flexibility by its personnel respecting local court operations and viewpoints.**

As with most organizations, from time to time tensions arise between field and central administrators. However, since a committee of the Judicial Conference is charged with oversight of the Administrative Office, and since the Judicial Conference itself has ample statutory authority to correct such problems, the Committee chose not to become involved in this matter. We do, however, encourage greater understanding and flexibility among the parties involved.

The Committee wishes to commend the current administration of the Administrative Office, including its director, for the many positive changes of recent years.

- **The Administrative Office should establish regional offices.**

As with budget decentralization, the regionalization of administrative and training functions now being performed in Washington, D.C., has become a topic of considerable discussion among judges and court administrators. The expectation is that regionalization will foster an identification with the needs of the individual courts and will thus allow the personnel of the local court and of the Administrative Office to gain a greater understanding of their respective roles. While excessive decentralization is not wise, the current situation encourages the erection of artificial barriers between court personnel and the Administrative Office.

The Committee believes that the emphasis in regionalization should be on providing more effective support services.

- **The Committee recommends that the Chief Justice, with the concurrence of the Judicial Conference, appoint the director and deputy director of the Administrative Office of the U.S. Courts.**

With regard to the appointment of the director and deputy director of the Administrative Office, the Committee believes that the power of appointment should be by the Chief Justice with the concurrence of the Judicial Conference. Currently, the Supreme Court appoints both the director and the deputy director of the Administrative

Office, yet the Court, with the exception of the Chief Justice, is removed from issues of administering the lower courts.<sup>81</sup> In turn, the Administrative Office serves the lower courts and is not responsible for the administration of the Supreme Court (which has its own administrative structure).

## **6. THE FEDERAL JUDICIAL CENTER**

- ▶ **Congress should increase funding of continuing legal education for judges and the expansion of the Federal Judicial Center's educational programs.**

One area of Federal Judicial Center work that the Committee views as meriting continued attention is its provision of continuing legal education for judges.<sup>82</sup> Judges, like other professionals, must periodically refresh their educations to stay abreast of the latest developments in the law. This is true with respect to both substantive changes and increasingly important administrative techniques of case management employed to handle heavy caseloads and complex litigation. No other entity is better suited to perform this function than is the Federal Judicial Center.

### **B. Personnel**

#### **1. SENIOR JUDGES**

- ▶ **Disincentives to senior status service that may cause judges either to accept outside employment or to hold onto active status during their advanced years should not be enacted.**

The Committee stresses the importance of maintaining the incentives that the current senior judge system affords. Few organizations in the nation have devised such a successful method of utilizing retired employees in its work force than has the federal judiciary. The current system allows a judge to retire on senior status, thus permitting his or her position to be filled by a new judge while, at the same time, the mature judge continues

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81. 28 U.S.C. §601.

82. In other parts of the report, we have suggested significant new duties for the Federal Judicial Center. See section on Long Range Planning.



to offer service to the courts as a "senior judge." The cost to the taxpayer is little more than what the retired judges' pensions would have cost, and, at the same time, the process opens up positions for incoming judges.

Without the senior judge program, more than 80 additional judgeships would be needed at an additional cost of 45 million dollars in order to provide the equivalent service to the public. Far from causing a loss to the taxpayer, the system has been an enormous public benefit; it employs persons who, in most other occupations, would be receiving costly pensions, yet performing no public service.<sup>83</sup>

## 2. JUDICIAL COMPENSATION

- The Committee applauds passage of The Omnibus Ethics Reform Act of 1989 (Nov. 18, 1989) and encourages Congress to continue to provide timely and adequate adjustments to maintain the proper relationship between prevailing economic conditions and judicial compensation.

## 3. NON-JUDICIAL PERSONNEL

- Consultants expert in personnel issues and organizational structure should evaluate the ability of the Third Branch to attract and retain a competent support staff.

In a period of substantially increased workload, the partnership between judges and a dedicated and competent support staff has been of critical importance in maintaining the high standards expected of the federal courts. Yet, in recent years, due to budgetary

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83. The Omnibus Ethic Reform Act of 1989 (November 18, 1989) approved a cost-of-living increase for U.S. judges and justices, as well as a cost-of-living adjustment. In order for senior judges to obtain these increases, however, the senior judge must be certified by the Chief Judge of his or her district or circuit as having met one of three requirements, one being the carrying on an annual basis of a courtroom caseload equivalent to three months of regular duty. This and related changes were designed to offset criticism that a judge who was doing no work would receive the increase. The Committee believes that, sensitively implemented, this change can be incorporated without undermining the system's essential incentive.



constraints, the probation and clerks' offices have functioned at only 90% to, at most, 95%, of authorized staffing levels. The Committee is advised that it is becoming increasingly difficult to fill positions requiring technical or technological skills at the entry salary levels allowed under the judicial salary plan. Consequently, a number of critical positions throughout the system remain unfilled.

In 1987, the Department of Labor warned the nation that a workforce crisis, generated in part by technological change and demographic trends, was imminent.<sup>84</sup> Increasing demands for highly skilled workers, combined with an aging workforce, has already created shortages of skilled workers . . . shortages that are likely to increase in ensuing years.<sup>85</sup> Naturally, government service, including court support personnel, is and will be affected by growing pressures from the private sector as well as an increasing need for more highly technically trained people in the courts but without concomitant means to attract and retain them. Qualified consultants should be retained to consider among other issues a more rational compensation structure, geographical pay differentials, fringe benefits, and expanded continuing education opportunities for support staff.

The Committee believes these issues must be addressed now in order to strengthen the personnel cadre who manage the courts' work on a day-to-day basis and provide the experience, continuity and institutional memory that sound government requires.

#### 4. MAGISTRATES

- ▶ District judges and magistrates should be permitted to remind the parties of the possibilities of consent to civil trials before magistrates.
- ▶ The Judicial Conference should conduct an independent, in-depth study of the statutory and constitutional jurisdiction of magistrates that (1) defines the constitutional perimeters of the

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84. Workforce 2000, Work and Workers for the Twenty-first Century, The Hudson Institute (U.S. Government Printing Office) (June 1987).

85. Id.

use of magistrates; and (2) catalogs the statutory jurisdiction of magistrates with a description of the presumption of validity and standard of review by the district court. The study should be conducted with the cooperation and assistance of a broad range of persons interested in the magistrates system.

The federal magistrates system plays a vital role in the work of the district courts. While each federal court employs magistrates in different ways, their existence helps keep the system afloat. A magistrate's duties<sup>86</sup> include initial proceedings in criminal cases, pre-trial matters referred by judges, and trials of misdemeanors, petty offenses, and the trial of civil cases upon the consent of the parties and the reference of the judge.

The Committee received many proposals about the role that magistrates ideally should perform.<sup>87</sup> Some magistrates believe that they are under-utilized and, hence, desire more diversity in the work they are assigned by the district court (some courts assign the magistrates little more than social security and prisoner cases for review). To this end, some magistrates propose statutory changes that would, in effect, bestow on them more judicial duties. For example, they wish to be given the authority to handle dispositive motions in civil cases and to be routinely assigned civil cases for all or virtually all, with a 30-day period for the parties to opt for a district judge in lieu of a magistrate. And there are numerous fine-tuning proposals; for example, it was suggested that a statutory change should be effected that would allow consent in petty offenses case to be made orally before the magistrate in open court rather than in writing.

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86. In general, the jurisdiction of a magistrate is that of the district court, but delegated to the magistrate by the district court judge, under statutory authorization. 28 U.S.C. 631(a).

87. Recommendations were received from the following sources: (1) testimony at the Committee's public hearings; (2) letters from magistrates and district judges; (3) a report from the National Council of United States Magistrates (the NCUSM is an independent, voluntary organization of full-time, part-time and retired U.S. Magistrates); (4) a report entitled The Federal Magistrates System prepared by the Division of Magistrates' Administrative Office of the United States Courts; and (5) a report from the Judicial Conference Committee on the Administration of the Federal Magistrates System.

The Committee encourages the adoption of procedures that will make efficient and appropriate utilization of magistrates. However, as was stated in a report on this subject by the Administrative Office, we must also recognize the need to "safeguard against undermining the institutional 'supplementary' role of magistrates [and the] unintentional creation of a lower-tiered judicial office with separate and distinct responsibilities."<sup>88</sup> The district courts clearly need the assistance of the magistrates in order for the judges to focus on those matters that require Article III attention. If, in fact, the magistrates become a second-tier judicial office, the magistrates will no longer be able to assist the district court judges.

Hence, the role of the magistrate must continue to be supportive and flexible. By the same token, we wish to encourage appropriate utilization. To that end, the Committee makes the following two proposals:

On the district court level, the task today (and for the next twenty-five years) is to make efficient and appropriate utilization of Article III judges, Article I judges, the magistrates, and the community and court resources in order to resolve disputes. In civil cases in particular, the courts must be creative in using available resources to resolve disputes. Court-annexed arbitration, lawyer mediation, mini-trials, appointment of special masters, use of magistrates to assist in civil cases and to conduct settlement conferences, and consent trials before magistrates are all vehicles that the courts will turn to with increasing frequency to keep current with the civil caseload.

In light of the above, the courts should be allowed to encourage consent to trial before magistrates. In that vein, 28 U.S.C. 636(c)(2) is too restrictive. It provides:

[I]f a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of the court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. . . . Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to

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88. The Federal Magistrates System, *supra* at 16.

consent to reference of any civil matter to a magistrate. (Emphasis supplied.)

Our recommendation is that the italicized language above be deleted and replaced with the following:

Thereafter either the district judge or the magistrate may again advise the parties of that right but, in so doing, shall also advise the parties that they are free to withhold consent without fear of adverse substantive consequences.

In order to alleviate practitioners' concerns that some judges might force trial before magistrates, Congress in its legislative history should note that both magistrates and judges should be sensitive to the rights of the parties to have their disputes resolved by Article III judges.

Some district courts have been reluctant to expand the role of magistrates because confusion exists regarding the magistrates' constitutional and statutory authority. Two recent Supreme Court decisions, Northern Pipeline Construction Co. v. Marathon Pipeline, 458 U.S. 50 (1982), and Granfinanciera v. Nordberg, 109 S. Ct. 2782 (1989), raise serious questions about what matters may be handled by non-Article III judicial officers. Although these cases both deal with bankruptcy issues, the Article III discussions are, we think, equally applicable to the magistrates, in general.<sup>89</sup>

Accordingly, the Judicial Conference of the United States should conduct an in-depth study of the constitutional perimeters of magistrate utilization. The study should also analyze the future role of magistrates and propose principles for defining the proper limits of that role. This study should include all cases and statutes other than 28 U.S.C.

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89. Furthermore, the recent Supreme Court decision of Gomez v. United States, 109 S. Ct. 2237 (1989), raises questions about the statutory duties that a magistrate may properly perform. In Gomez, the Supreme Court held that the "additional duties" provision of 28 U.S.C. 636(b)(3) would not allow a magistrate to preside over the selection of a jury in a felony trial without the defendant's consent. The Court looked, in part, to the legislative history of the Federal Magistrates Act to determine what type of duties a magistrate may perform. District judges would benefit from the publication of an analysis of the legislative history of The Federal Magistrates Act with a list of those duties which bear "some relation to the specified duties" as Gomez dictates. *Id.* at 2441.



636 that discuss the duties that magistrates can perform so that the district court will have a full compilation of the magistrate's statutory authority.

Furthermore, a discussion regarding the standard of review by the district court should be included. De novo review can be so time-consuming and costly for both court and litigants that in many cases referral of a matter ultimately requiring de novo review may be inefficient. On the other hand, if a magistrate's ruling is subject to the clearly erroneous or abuse of discretion standards, then reference of a matter to a magistrate would be more efficient.

The proposed study should be sent to all district court judges so that these courts can use the study to implement ideas to maximize utilization of the magistrates according to the needs of the court. Furthermore, the Judicial Conference of the United States should determine whether statutory amendments should be proposed to give the magistrates such authority as is necessary to provide the requisite support to the district court.

## 5. PROBATION SERVICES

- The post-conviction supervision of persons on probation, parole and supervised release should not be moved from the Judicial Branch to the Executive Branch.

The probation office in each judicial district has two functions: (1) pretrial investigation, and (2) post-conviction supervision of persons on probation, parole, and supervised release. Although it is generally agreed that the pretrial investigative function should remain within the Judicial Branch, it has been suggested that the function of post-conviction supervision be transferred to the Executive Branch because that work is similar to other correctional functions now performed within that branch. The Committee, however, disagrees and recommends that the post-conviction supervision of persons on probation, parole and supervised release, remain in the Judicial Branch.

The probation service presently functions well, and furthermore, that its position within the judiciary enhances its effectiveness. The current dual function of the probation offices offers two advantages. First, the probation officers can move freely between investigation and post-conviction supervision; many take advantage of this opportunity. In some offices, for example, probation officers typically begin working in pretrial investigation where they become familiar with the federal criminal justice system. After gaining experience,

many choose to shift to work involving post-conviction supervision. The flexibility and variety offered by the dual function of the federal probation offices has been a factor that has helped to attract and retain an excellent staff. Second, the dual function of each office makes it easy to use information gathered during the pretrial investigation for purposes of post-conviction supervision as well.

The employees of the probation service are well qualified, experienced, and highly trained. They elected to work for an agency located within the Judicial Branch; many may object to being transferred to the Executive Branch. Transferring the probation service's post-conviction functions to the Executive Branch may also tend to centralize what is now a highly decentralized system of offices in each judicial district; these offices have great familiarity with local conditions and boast the ability to adapt quickly to changed circumstances (such as the availability of additional beds in a particular treatment program). These advantages would be lost if the probation officers involved in post-conviction supervision were transferred to a centralized agency within the Executive Branch.

### C. Resources

#### 1. FEDERAL DEFENDER PROGRAM

- ▶ With respect to compensation under the CJA, the Committee believes that the establishment of a specific formula is beyond its expertise but recommends that the Judicial Conference propose a formula for the compensation of CJA counsel that will include a an amount to cover reasonable overhead and a reasonable hourly wage.
- ▶ Congress should require that the selection of the federal defender in each jurisdiction be done by an independent board or commission formed within the district to be served.
- ▶ The Judicial Conference should conduct a comprehensive review of the Criminal Justice Act, including its implementation and its administration.

More than twenty years have passed since the last independent review of the Criminal Justice Act Program ("CJA").<sup>90</sup> Since that time, the federal defender program has grown substantially in size and complexity. For example, panel

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90. 18 U.S.C. 3006a (1964).



attorney appointments have risen from 16,000 in 1966 to 65,000 in 1988.

In view of (1) the great importance of this program and (2) the issues that have arisen concerning the judiciary's role in the establishment and termination of a federal defender organization, the appointment, reappointment, and compensation of federal public defenders and panel attorneys, the Committee recommends that the Judicial Conference appoint a special committee to conduct an in-depth study of the federal defender program. The purpose of the review would be to assess the current effectiveness of the CJA program and to recommend appropriate legislative policy, as well as procedural and operational changes.

In addition to present and former federal defenders, appointees to this study committee should include representatives of the criminal defense bar selected by the National Legal Aid and Defense Association (NLADA), the National Association of Criminal Defense Lawyers (NACDL), and the Criminal Justice Section of the American Bar Association. Because issues of administration, ethics and the public trust and interest are involved, participants sensitive to such perspectives should likewise be appointed.

The Committee recommends that the study committee, when formed, focus on:

- (1) The impact of judicial involvement on the selection and compensation of the federal public defenders and on the independence of federal defender organizations, with special emphasis on:
  - a. Appointment, reappointment, and compensation of federal public defenders;
  - b. Establishment and termination of federal defender organizations;
  - c. The federal public defender and the community defender options.
- (2) Equal employment and affirmative action inadequacies, particularly as to the directors of the various federal defender programs.
- (3) Judicial involvement in the appointment and compensation of panel attorneys and experts.

- (4) Inadequacy of compensation for legal services provided under the CJA.<sup>91</sup>
- (5) The quality of CJA representation.
- (6) Lack of adequate administrative support for defender services programs.
- (7) Maximum amount of compensation for attorneys with regard to appeals of habeas corpus proceedings.
- (8) Contempt, sanctions and malpractice representation of panel attorneys.
- (9) Appointment of counsel in multi-defendant cases.
- (10) Early appointment of counsel in general, and prior to the pretrial services interview in particular.
- (11) The method and source of payment of the fees and expenses of fact witnesses for defendants with limited funds.
- (12) The provision of services and/or funds to financially eligible arrested but unconvicted persons for non-custodial transportation and subsistence expenses, including food and lodging, both prior and during judicial proceedings.

Finally, the selection of federal public defenders should be made by independent boards or commissions. Currently, at least five federal defenders in San Diego, Chicago, New York, Philadelphia, and Atlanta are selected by independent boards. These programs are considered by many to be among the best federal defender offices in the nation. In these jurisdictions, the federal judges are spared the time-

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91. The Committee recommends that the study propose a formula for the compensation of CJA counsel that will include an amount to cover reasonable overhead and a reasonable hourly wage. The notion that CJA representation is or should be a casual pro bono assignment has long since been outmoded. While the Committee does not anticipate that CJA representation will be compensated at the rates charged by leading, retained counsel, the Committee nonetheless believes that representation of indigent defendants should not involve a financial loss to counsel.

consuming burdens of selecting the chief defender and of administering the panel attorney system.

Given the maturation of the defender movement, the dramatic increase in criminal prosecutions, the evolving sophistication and complexity of criminal law, the constitutionally mandated necessity of competent defense counsel, the small percentage of the legal profession that practices criminal law, the legal and ethical requirement of an independent criminal defense bar, the heavy workload of the federal judiciary, the independence of the federal prosecutor, and the rebirth of the federal death penalty, it is now essential to ensure the continued development of independence and autonomy within federal defender programs by assuring that the selection of federal public defenders, as well as their retention and termination, will be the responsibility of an independent commission or board.

## **2. SCIENCE AND TECHNOLOGY IN ADJUDICATION**

- ▶ **A comprehensive examination should be made of issues and measures concerning technology and the natural and social sciences in adjudication, including the scope and nature of the problem, the means of using impartial experts, and the advancement of judicial skills and capabilities in the use of scientific, economic, and technological information. In particular, the following steps should be taken:**
  - 1. An analysis of the types of scientific issues presented to the courts, their frequency, and the problems they present;**
  - 2. The identification of improved procedures for the handling of scientific evidence in the adjudication process, and an evaluation of the pros and cons of using panels of court-appointed experts, science masters, and the like, in various types of cases;**
  - 3. The development of procedures (1) to enhance the fairness and accuracy of judicial notice of scientific information and materials; (2) to govern the nomination, designation, utilization, and compensation of court-appointed science experts; and (3) to govern the use of alternative dispute resolution mechanisms for scientific and technological issues; and**
  - 4. An evaluation to determine the best methods of improving the ability of judges, magistrates,**

and law clerks to handle scientific and technological materials in adjudication.

- A manual that addresses the courts' consideration of scientific and technological issues should be created.

The significance of technology and the natural and social sciences in the courtroom is becoming increasingly important, in both routine and complex litigation. The role of science and technology poses several kinds of problems -- of competence of law-trained judges and generalist juries to deal with the information; of workload as the amount and complexity of material to be absorbed increases; and of culture clash as adversarial partisanship confronts the scientific ideal of the disinterested search for truth. Among the long-range tasks the Federal Judicial Center could undertake as a priority matter would be a study of some or all the items enumerated above.

The federal courts' need to deal with complex scientific and technological questions tends to be sporadic, depending on the luck of the draw in litigation. Consequently, we do not propose regular training in the area for all, or even all new, federal judges; it might be untimely or wasted. Rather, federal judges may profit from an available reference source on the types of problems likely to be encountered when such a case arises, much as they do from the Manual for Complex Litigation. Such a manual could be a product of the Federal Judicial Center or of the proposed Office of Judicial Impact Assessment if it undertakes the study recommended above.

### 3. SPACE AND FACILITIES

- Congress should permit the judiciary to contract for its own space and facilities (using the G.S.A. and other agencies on a contract basis when appropriate).

The Committee endorses legislation soon to be introduced in Congress that would transfer responsibility of the courts' facilities from the General Services Administration ("G.S.A.") to the judiciary.<sup>92</sup>

This legislation, developed by the Space and Facilities Committee of the Judicial Conference, is a response to the

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92. This legislation, entitled The Judicial Space and Facility Management Improvement Act should be introduced in the U.S. Senate in early 1990. The proposed legislation was approved by the Judicial Conference at its September 1989, meeting, and has been carefully drafted with support from the Administrative Office.

long history of frustration the courts have experienced in their dealings with the G.S.A. While G.S.A.'s expertise ought to be a resource to be tapped by the courts, allowing that agency to control the courthouse has been problematic from both a philosophical and practical point of view.

Although this legislation, if passed, would increase responsibility for local court administrators, the flexibility and improved efficiency gained should override the new burdens imposed.

#### 4. FEDERAL COURT LIBRARIES

- Qualified library consultants should conduct a detailed examination of the resources, capabilities and operations of the federal court library program.

The last detailed study of the federal court library system was conducted in 1978.<sup>93</sup> Yet, between 1978 and 1988, the total number of primary users served by the federal court libraries -- including judicial officers, law clerks and staff attorneys -- doubled from 1,895 to 3,928. Law clerks, the chief users of the libraries, alone increased in number from 849 to 2,107 in the same period. The number of central libraries serving judges and their staff grew from 28 to 70; those libraries presently serve some 1,570 judicial officers located in over 330 cities.

During this ten-year period, the numbers of library support staff have not kept pace. In 1981, a formula was developed by the Judicial Conference to determine the number of library personnel needed to meet the legal research and library services needs of the judiciary. This formula provided one library staff member for every six full-time judicial officers. Until recently, there were over twenty satellite locations serving over six judicial officers without any library staff on site. Additionally, when one moves beyond satellite operations and looks at the entire federal court library system, one discovers that present staff levels are only 80% of the support staff suggested under the 1981 staffing formula.

In terms of automation and information delivery, the federal court library system is ten to fifteen years behind its counterparts in academia and the private sector. Automa-

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93. Improving the Federal Court Library System, report and recommendations submitted to the Judicial Conference of the United States by the Board of the Federal Judicial Center, February 1978.



tion efforts require intensive and critical planning prior to systems implementation. As a result of constantly having to address immediate needs (instead of focusing on thoughtful, long-range planning) the federal court libraries are in the precarious position of managing differing data utilizing a variety of software on noncompatible hardware.

Key long-term planning elements must be identified and research conducted to develop proposals for finding methods to provide adequate library support services to judges, wherever they are, without making an unnecessarily large investment in space, staff and books.

The services provided to the judiciary by the federal court library system are critical to the substantive decisional process. Thus, a detailed examination of the resources, capabilities and operations of the federal courts' library system should be undertaken at the earliest possible time. In view of the growing gap between the Federal courts library program and other public and private sector libraries, such a study should be conducted by qualified library consultants specializing in long range planning and personnel evaluation.

#### **5. BUDGETARY ISSUES**

- ▶ Include in the budget for the federal judiciary the budgets of both the Court of International Trade and the Court of Appeals for the Federal Circuit.

Currently, the Court of International Trade and the Court of Appeals for the Federal Circuit each submit their own budget to the Office of Management and Budget separate from the rest of the judiciary. This special treatment is due to a historical anomaly that is inconsistent with the budgetary process for the other federal courts. The Committee believes it would be more appropriate for the Court of International Trade and the Court of Appeals for the Federal Circuit to participate in the same budgetary process as the rest of the federal judiciary. Hence, we recommend that legislation be enacted to correct this anomaly.

#### **6. COURT REPORTERS AND EVOLVING TECHNOLOGIES**

- ▶ The Judicial Branch should carefully consider the impact on both courts and litigants at the trial and appellate levels before adopting any technological innovation.

The Committee recognizes the enormous importance of an excellent court reporting system to the efficient functioning



of the federal courts. Delays in obtaining transcripts are probably the most serious single cause of appellate delay.

The Committee does not have the resources to study and report on the specifics in this rapidly changing area, but it does take note of a number of continuing concerns in this area to the courts, reporters, and litigants. Accordingly, the Committee urges that the federal judiciary and, in particular, the Administrative Office give high priority to ensuring that transcripts are produced in the most efficient and expedient manner possible. The Committee also cautions that resort to a technological innovation, at any level of the federal judiciary, should not occur until the impact of that improvement has been assessed by both the courts and litigators at the trial and appellate levels.

## 7. UNPUBLISHED OPINIONS

- ▶ A representative ad hoc committee under the auspices of the Judicial Conference should review policy on unpublished court opinions in light of increasing ease and lower cost of database access.

The policy in several courts of appeals of not publishing certain opinions, and concomitantly restricting their citation, has always been a concession to perceived necessity. Sheer bulk prohibits universal publication in the Federal Reporter, and many opinions are indeed easy applications of established law to fact. Still, nonpublication policies present many problems; and access via electronic databases may sufficiently ease the difficulties of regarding all opinions as "published" and subject to citation to call for reconsideration of existing nonpublication and limited-citation policies.

Researchers have argued that nonpublication policies are inconsistently administered and partially circumvented by regular litigants, who receive and often circulate internally such opinions and then are able to use arguments from them in other cases -- thus defeating one purpose of restrictions on citing them, which is to keep those with better access to unpublished opinions from having an unfair advantage.<sup>94</sup>

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94. See generally D. Stienstra, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals (1985); Robel, The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals, 87 Mich. L. Rev. 940 (1989); Songer, Smith & Sheehan, Nonpublication in the Eleventh Circuit: An Empirical Analysis, 16 Fla. St. U.L. Rev. 963 (1989); concurring and dissenting (continued...)

Doctrinal reasons also exist for questioning the nonpublication rules on the ground that litigants should be able to argue that they are indeed situated similarly to a party in a previous case, even if the court thought it not significant enough to warrant publication. Universal publication has enough problems of its own that we cannot recommend it now; but inexpensive database access and computerized search techniques may reduce inequality problems enough to warrant revisiting the issue.

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94. (...continued)  
statement of Chief Judge Holloway to 1986 revision of Tenth Circuit Rules.

#### IV. LONG RANGE REFORMS

##### A. THE APPELLATE CASELOAD CRISIS

- ▶ Congress and the Administration should take immediate steps to address the demonstrated need for additional appellate judgeships.<sup>95</sup> This action should be based on formulae currently in use, as supplemented by the Judicial Conference and its advisors.
- ▶ The Judicial Conference should, after study, make more precise the caseload formula for determining the judgeship needs of the courts of appeals -- in particular, to take into account the varying types of appeals handled in each court. Congress should provide the necessary resources and funding for this project.
- ▶ The Administration and Congress should move expeditiously, whenever a judgeship vacancy occurs, to fill such vacancy.
- ▶ The Judicial Conference should commence an intercircuit study project -- perhaps under the aegis of the Federal Judicial Center -- of the most effective and reliable means of appellate case management, and to devise a way to exchange caseload management information between the courts, so that all courts have available the most current information on caseload management.

##### 1. The Need for Additional Judges

The Committee is alarmed at the extraordinary growth in the number of filings in the nation's appellate courts. Since 1945, the rate of appeals has risen from one appeal for every forty-two district court terminations, to one appeal for every eight such terminations.<sup>96</sup> As a result, filings in the courts

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95. This short-term recommendation (that Congress create more appellate judgeships) is not inconsistent with the Committee's long-term proposal that Congress and the Judicial Conference investigate other avenues of reform to reduce the workload of the courts before routinely adding to the federal branch.

96. Flanagan, Appellate Court Caseloads: A statistical Overview (paper prepared for The Subcommittee on Structure) p.1.

of appeals have risen astronomically by 1,355 percent, or nearly fifteen-fold. Yet, during this same period, the number of appellate judges needed to hear these cases has increased only by a factor of three, from 59 to 156.<sup>97</sup> We estimate that each judge's share of the caseload has multiplied by a factor of nearly six over the same period.

Also revealing is the increase in number of case participations per judge. In 1965, each appellate judge, sitting in a panel of three, participated in an average of 136 terminations.<sup>98</sup> By 1989, the average number of participations had risen to 382 per judge (varying from a low of 208 in the D.C. Circuit to a high of 530 in the Eleventh Circuit). Thus, per judge participations by 1989 were almost three times as many as in 1965. Certainly in circuits such as the Fourth, Fifth, Sixth, Eighth and Eleventh, where per judge participations in 1989 were respectively, 497, 461, 479, 420 and 530, there can be no doubt that the caseload per judge is excessive, and in the opinion of the Committee, grossly so.<sup>99</sup>

The Committee's view is fortified by workload figures we have reviewed from the intermediate state appellate courts that indicate that the federal appellate caseload is higher than that of many state appellate courts, even though the responsibilities of the federal circuit judges are greater.

These figures indicate that the number of cases for which each judge is responsible is not only at a record high, but at a level so high that judges of the 1940's and 1950's would have found the workload unmanageable. The figures also demonstrate that, at this moment, in every circuit except for the D.C. Circuit and the Second Circuit, the number of cases in which each judge takes part exceeds the number (255) that the Judicial Conference uses as its standard for determining an

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97. Id. at Table 5.

98. The number varied from 85 in the Eighth Circuit to 207 in the Fifth Circuit.

99. The revised judgeship bill filed on behalf of the Judicial Conference (based on 1987 statistics) requests sixteen new judgeships for the courts of appeals. These numbers doubtlessly will be revised upwards in light of more current (1989) figures. The Court of Appeals for the Eleventh Circuit, although clearly in need of more judges, has declined to request any because of concerns about the lack of collegiality and other problems associated with circuit growth.

appropriate annual work load for each appellate judge.<sup>100</sup> Furthermore, the number is higher than the 225 merits participations per appellate judge that was found to be an appropriate work load by three experts who carefully considered the matter in 1976.<sup>101</sup> In our Committee's poll of circuit judges, most judges responded that a standard of 225-255 merits participations was an acceptable figure as an annual workload standard per judge.

This pyramidic growth has and will have a profound impact on the federal courts of appeals: (1) it has increased the caseload per appellate judge; (2) it has increased, and will further increase, the number of judgeships needed; and (3) it has decreased the relative percentage of all appeals that the Supreme Court is able to hear, thus causing an increasing proportion of federal law to be decided, sometimes inconsistently, at the regional appellate level.

To their great credit, the Courts of Appeals have kept abreast of their caseloads so far. This is no small achievement: to accomplish it, judges have had to raise their individual productivity nearly six-fold since 1945. But the means to do this have been largely exhausted. These have included, besides the judges' own efforts, (a) multiplying each judge's law clerks from one to three; (b) utilizing "central" staff (staff attorneys); (c) reducing oral argument times; (d) shifting cases to non-argument tracks; (e) disposing summarily of weaker cases; and (f) other innovations, like settlement programs. While it is vital that the circuits continue to study and utilize the most advanced case-management methods, we fear that further increases in the high ratio of case filings to number of judges must inevitably be at the expense of the quality of the courts' work. The Committee is concerned that, for lack of time, cases that should be heard may not,<sup>102</sup> those that are heard may be decided with insufficient thought, and decisions of precedential importance could be written

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100. Report on the Judicial Conference Subcommittee on Judicial Statistics to the Committee on Court Administration. July, 1986, pp. 2-4.

101. Paul D. Carrington, Daniel J. Meador and Maurice Rosenberg, Justice on Appeal (West 1976).

102. Since 1975, the number of appeals decided nationwide without oral argument has risen from 30 to 50 percent. In two circuits, in particular, 67 percent of all appeals are decided without oral argument. In most courts of appeals, cases submitted on briefs are decided with a reasoned opinion of some type, usually unpublished. However, in three circuits, many unargued appeals are disposed of without stated reasons.



carelessly. We fear that workload pressures may cause nonwriting judges to acquiesce too readily to the draft of the writing judge, without themselves providing constructive insight and criticism. Overtaxed to this extent, appellate courts could do serious harm not only in rendering ill-advised decisions but in producing ill-considered caselaw. These would be serious defects indeed in a justice system upon which modern society depends not only to decide controversies but also for the interpretation of its laws. This is all the more true since, while the Supreme Court is the ultimate arbiter, it is able to hear only a diminishing percentage of the ever-growing number of important appeals.

While we emphasize that no breakdown in quality of the type mentioned above has come to our attention, we believe that the productivity of our appellate courts today is at maximum levels. Delay in adding judgeships while the dockets continue to grow could undermine the courts' ability to function properly. Accordingly, we urge Congress to address now the problem of needed judgeships at the appellate level.

2. The Need for a Reliable Caseload Formula  
for Determining the Judgeship Needs  
Circuits.

Determining how many judges each court needs is not a simple task. To help gauge present and future judgeship needs, a more sensitive and sophisticated workload index than the inflexible 255 participations rule described above is needed. We believe that Congress and the courts would be well assisted by the development of a better indicator, particularly one that takes into account case types. The mix of cases varies greatly among the circuits. It seems unrealistic to treat social security appeals as requiring the same investment of judicial time as do securities or civil rights appeals. Presently, the only weighting the Judicial Conference undertakes in utilizing the 255 participations per judge index is to treat prisoner petitions as constituting only one-half a case.<sup>103</sup> We think that a weighted formula is preferable to pretending that cases in every category require the same amount of judicial attention. Other indices also may be developed to better determine judgeship needs.

To devise such a formula will require research into the time actually spent by judges in handling particular appeals.

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103. For some time, however, the Judicial Conference has used a weighted case load index in determining the judgeship needs of the district courts. For a number of reasons the latter formula is not yet entirely satisfactory and is undergoing further study.



Both the formula itself and the research that precedes it will help provide a more reliable means for assessing how many cases a judge can handle.

It has been the hallmark of our judiciary that the judges do much of their own work. While modern methods have properly added more staff assistance to the process, the judge should remain the central decision maker. We must not give appellate judges a caseload so large that they either surrender their decision-making to staff or also decide cases under such pressures so as to be incapable of thoughtful and just decision-making.

The Committee, therefore, emphasizes its belief that the courts of appeals today are, in general, at full capacity, and that many of the circuits stand in immediate need of more judges. Where courts are stretched to their limits and where case load reductions are not realistically a prospect, we know of no responsible course other than the addition of judges. In so urging we do not wish to be seen as precluding further efforts at even more efficient case processing. Such programs as the Supreme Court of Washington's utilization of appellate commissioners are well worth more careful consideration. Nonetheless, no program that we are aware of will preclude the need for a significant increase in the number of judges.

#### THE COURTS OF APPEALS - STRUCTURAL CONSIDERATIONS

- Call for Congress, the courts, bar associations and academia to give the problem of appellate structure serious attention over the next five years.

Within the next five years it should be decided whether to retain the present circuit structure or to adopt a new system. During this period, the Committee hopes that a study and pilot project, as proposed in the following section of this Report, will be undertaken. This study and pilot project should lead to a greater understanding of the nature and extent of the intercircuit conflicts problem, and of mechanisms to help resolve those conflicts. Armed with this knowledge, and with newly-gained experience with larger circuits, a better educated choice can be made whether to keep the present structure, or to devise some other.

##### (a) Background

The present system of regional circuits was laid out in 1891. Beginning with only three judges, the courts of appeal in each circuit ranged in size by 1950 between three and seven judges (except for the D.C. Circuit, with nine), with an average of under six judges. These courts still continued the practice of sitting in panels of three judges, regardless of

overall size. Through the 1950's, all the courts of appeals could be viewed as unitary tribunals. Each court's small size and intimacy made possible the belief that, even though it sat in rotating panels of three, the court was physically a single unit, much like the appellate courts that headed each state.

In the past three decades, however, the number of appellate judges has trebled in response to an appellate caseload that has multiplied nearly fifteen-fold. With caseload continuing to rise, creating additional new judgeship needs, the small unitary court of appeals appears rapidly on the way to obsolescence.

In 1975, the Hruska Commission expressed great concern over the expansion of courts of appeals beyond nine judges each.<sup>104</sup> Its recommendation, that the Fifth and Ninth Circuits be divided, reflected this concern. The Fifth Circuit, accordingly, was divided in 1981. The Ninth Circuit has not been divided and today operates with 28 authorized judgeships. Ironically, only a few years later, both the Fifth and the Eleventh (which was created from the Fifth) Circuits, have caseloads that could soon bring them to 20 or more judges each. The Sixth Circuit Court of Appeals faces a similar situation, as do the Third and Fourth Circuits.

Furthermore, the number of appellate judgeships has risen nationally from 59 judges in 1945 to 156 in 1989. And, the average size of a court of appeals itself has risen from five judges in 1945 to 13 judges in 1989. Thus, while in 1945 every appellate court was a small unitary tribunal not unlike a typical state supreme court, that is clearly no longer true. Today, the authorized court judgeships are as follows: D.C., 12; First, 6; Second, 13; Third, 12; Fourth, 11; Fifth, 16; Sixth, 15; Seventh, 11; Eighth, 10; Ninth, 28; Tenth, 10; Eleventh, 12. Applying the 255 participations formula<sup>105</sup> now in use by the Judicial Conference of the United States to determine new judgeship requirements, the courts theoretically needed 50 additional judges to handle just their 1989 caseload, for a total of 206 judges. If this number of judges were, in

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104. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedure: Recommendations for Change, 57-59 (June 1975).

105. Report of the Judicial Conference Subcommittee on Judicial Statistics to the Committee on Court Administration, July, 1986, pp. 2-4.

fact, realized, the "average" court of appeals today would have 17 judges.<sup>106</sup>

The Committee has secured other projections of future judgeship needs utilizing the 255 participations formula. Assuming that appellate caseload rises in the next five years at the same rate that it has from 1960-89 (the most conservative of several projections), a total of 280 judges would be required in 1994, for a per circuit average of 23 judges. (Three courts of appeals would have over 30 judges, and the Ninth, would have 43). This same projection would predict a need for 315 appellate judges in 1999 (26 per court, with the Fifth at 39 and the Ninth at 49), and 392 judges by 2009 (33 per circuit, with the Fifth at 49 and the Ninth at 61 judges).<sup>107</sup>

The burgeoning caseload has thus caused a sharp increase in the number of circuit judges needed nationwide. Many of the courts could reach 20 or more judges within a few years.

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106. Broken down, the judges needed under that standard, based on 1988 statistics, would be as follows: D.C. Circuit, 0; First, 2; Second, 0; Third, 5; Fourth, 8, Fifth, 8, Sixth, 9; Seventh, 1; Eighth, 2; Ninth, 2; Tenth, 3; Eleventh, 10. These numbers are much greater than the 16 judgeships requested by the Judicial Conference in its pending judgeship bill (revised to include the Sixth Circuit's recent request). The number in that bill is derived from lower 1987 statistics. Besides considering the 255 participations formula, the Conference, in drawing up that bill, reviewed other factors affecting the courts of appeals, including the views of the judges. A Conference committee is now in process of drawing up judgeship needs based on 1989 statistics. We note that the judges of the heavily burdened Eleventh Circuit declined to request any new judgeships pending the report of this Committee. The Sixth, on the other hand, after initially voting not to request additional judges, reversed its position in 1989. Other circuits requested fewer judges than the 255 participations rule would allow. The circuits' reluctance to request new judgeships reflects a resistance to further growth. It could also reflect genuine weaknesses in the 255 participations formula, where caseload growth may reflect case types not requiring much judicial time.

107. If the future judgeship increase is projected on the basis of trends from 1970-89 (and not the 225 participations formula), a larger increase occurs: 288 judges are needed by 1994; 332 by 1999; 423 by 2009. Under this projection, the average circuit would need 24 judges within five years; 28 within ten years, and 35 within 20 years. The Fifth would reach 54 judges within 20 years, and the Ninth, 67.

**(b) The Hruska Model: Nine Judge Circuits  
and the Ninth Circuit Experiment**

The Committee initially considered adopting the Hruska Commission's goal of maintaining each court at approximately nine judges. We declined to adopt that view for the reasons given below. We think it would be premature to adopt such a goal now, although growth pressures will soon force a decision. There are several reasons for postponing an immediate response:

First, caseload growth has been so great to date that any decision to effect a permanent system of small circuits would involve dividing and reorganizing not only the Ninth, but the Third, Fourth, Fifth, Sixth and Eleventh Circuits. Nor could the present circuits be reduced simply by dividing them. More likely, the present circuits would have to be dissolved, and a new set of circuits devised perhaps with a mechanism for periodically reorganizing them so as to maintain the number of judges in any one circuit below the maximum desired. We are aware of no constitutional bar to this; the lower federal courts have been thoroughly reorganized several times throughout their history. On the other hand, the effort and disruption involved would be staggering. A fundamental change like this should be recommended only if it is clearly the right step. The Committee believes it needs to know more before it can recommend the creation of twenty or more smaller circuits to be the most desirable course for the future.

Second, a system of small circuits is workable only if a mechanism can be devised to handle the problem of intercircuit conflicts. As discussed below, the growth in the number of appeals processed has increased the number of intercircuit conflicts. A shift from thirteen to twenty or more circuits can only exacerbate the problem. As we discuss below, we must learn more about the seriousness of the conflicts problem if we are to deal with it effectively. If the recommendations suggested below are followed, the knowledge and techniques learned regarding intercircuit conflicts might conceivably argue for the subdivision of the appellate judiciary into more circuits using intercircuit panels and various national stare decisis rules to control conflicts.

On the other hand, it may turn out that twenty or more circuits would be more manageable if evolved into the lower tier of a two-tier federal appellate court, with the upper tier comprised of four or five higher tribunals, each with discretionary appellate jurisdiction over four or five circuit courts. Since such a multi-level plan would involve a fundamental structural change in the federal court system, the decision to create many small circuits should be postponed



until we are better educated as to what such a step would entail.

Third, the Court of Appeals for the Ninth Circuit's apparent ability to manage effectively with 28 judges gives us pause. Viewing that court as an experiment in the management of a "jumbo" court, we think it worth letting more time pass before definitively concluding larger circuits are, indeed, unworkable. The Ninth Circuit insists that it is managing well.<sup>108</sup> A number of judges agree.

However, a large majority of judges outside the Ninth Circuit (and some within) disagree with the proposition that bigger is better. Three quarters of the circuit judges who responded to the Committee's poll felt that 15 or fewer judges best served the proper and effective functioning of the circuit courts of appeals. Many identify twelve or even nine as the ideal maximum.

The debate between the Ninth Circuit and the more traditional smaller circuits revolves around two very different conceptions of the role of an appellate court. The Ninth Circuit works as a rotating system of three-judge panels (over 3,000 combinations are possible) covering an enormous geographic area, bonded by a very capable administration and serviced by the nation's only small (11 person) en banc. (Its willingness to accept a small en banc -- a mechanism recommended by the Hruska Commission -- may well be a key to its ability to operate, since the impossibility of large court en banc procedures was one of the reasons the old Fifth Circuit agreed to split.) In contrast, other circuits still prefer the traditional concept of a small, unitary court, characterized by intimacy between the judges even as their growing caseload makes this ideal more and more difficult to sustain. Either the Ninth Circuit represents a workable alternative to the traditional model, or the entire present appellate system needs restructuring, since other circuits are inevitably destined for "jumbo" status unless caseload can be curtailed.

For example, Professor Arthur Hellman, who has studied the question of intracircuit conflicts in the Ninth Circuit, reports that the panels of that court have been faithful to stare decisis, and that the en banc has acted effectively when

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108. See Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1978, submitted by The Judicial Council and The United States Court of Appeals for the Ninth Circuit (July 1989).



required.<sup>109</sup> He concludes that the Ninth Circuit is not at all torn by intracircuit conflicts.<sup>110</sup> The Court itself insists, in its latest report, that it should be regarded as the harbinger of future appellate courts rather than as an abnormality.

We conclude that more study and far more debate among bench and bar is needed before this issue can be appropriately resolved. The Ninth Circuit's experience indicates that with good leadership a large court can keep current and, in the eyes of many, do its job. Thus, we are encouraged to believe that, at least for the next five years, the present system is capable of absorbing the caseload while further thought is given to a future course of action.

### (c) Other Structural Proposals

We do not mean to suggest that the only options are categorically either small or large circuits. The Committee studied the following alternatives:

1. Adoption of a certiorari system, permitting each court to control the number of cases it reviews (i.e., abolish appeals of right in some or all cases).

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109. Judges and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court, 51 U. Chi. Law Rev. 541 (1989).

110. One piece of data contrary to Professor Hellman's report is found in the answers by Ninth Circuit district judges and attorneys to a survey published in July 1987. Asked if they agreed with the statement "There is consistency between panels considering the same issue," 59 percent of attorneys and 68 percent of district judges disagreed. Many respondents felt strongly that there was no consistency. Professor Hellman acknowledged a degree of inconsistency in those Ninth Circuit cases where the governing legal rule permitted a court to apply a variety of judgmental factors, of a type that could vary from person-to-person. Since his study did not attempt to compare the Ninth with smaller circuits, which presumably might also reflect different judgment calls in such matters, it is difficult to assess whether the Ninth differs in this respect from other courts. As the Supreme Court itself indicates, small size does not guarantee uniformity of view. A further question raised as to the Ninth Circuit has been its relatively long period between the filing of an appeal and disposition (approximately 14 months). This is the second longest in the nation.

2. Abolition of the present circuits, and replacement with one of several new structures designed to accommodate more judges and a greater caseload.

3. Retention of the present system, with, perhaps, study of further innovations to make the "jumbo" circuits of the future more manageable.

The Committee has looked into these possibilities with as much care its short timetable permits. Alternatives 1 and 2 require fundamental structural changes in the judicial system. The choices are difficult and complex and we see few benefits in selecting one specific change now rather than inviting public consideration of the entire matter over the next few years.<sup>111</sup> Other Committee proposals, it is hoped, may result in a reduction in appellate caseload, relieving some pressure for change or tipping the scales towards a different alternative. Less likely, but still possible, fundamental changes in society or in the economy might bring about such a caseload reduction. Finally, members of the bench and bar should be brought more fully into the discussion.

We think it important, however, to set out the practical alternatives which we have found, since it is against these options that the choice of retaining the current system must be made.

1. Should a system of court of appeals certiorari be adopted?

A simple way to control the rising appellate workload would be to give to each of the courts of appeals the power now possessed by the Supreme Court to control its own docket. Courts of appeals could tailor to their available judgeship resources the number of appeals they will determine. A screening procedure and supplemental rules would enable each court to decide which cases to hear. Furthermore, the screening procedure could include a requirement, much like the certificate of probable cause required in habeas cases, that all

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111. The Committee, accordingly, takes no position on the question of splitting the Ninth Circuit. That question involves issues peculiar to the region with which we are not qualified, in the time or with the resources we have been given, to address. Insofar as the question turns on whether, as a general principle, we disfavor circuits of that size, we think an answer would be premature, since it would require us to determine now whether a major reorganization touching upon all or most of the circuits in the nation is desirable. As noted above, that is an extremely difficult puzzle, the pieces to which are not yet all available.

appellants first seek the district court's approval to appeal. While the court of appeals could still grant review if the district court declined approval, the lower court's view would be helpful. Several state courts, notably in Virginia, West Virginia and New Hampshire, have adopted a discretionary review procedure, as has the United States Court of Military Appeals.

The argument against discretionary review is that it must be conducted in a very painstaking manner unless it is to do violence to the tradition of appellate error correction. Unlike the Supreme Court, courts of appeals are traditionally vested not just with law-declaring, but also with an error-correcting responsibility. To determine if error could have occurred below, an appellate court will have to conduct a fairly comprehensive examination, aided by briefs and by the trial record. The amount of time spent in this searching kind of inquiry, as a prerequisite to review, may be just as great as the efforts a court of appeals currently makes in identifying already docketed cases for summary or other disposition. As discussed elsewhere, today's courts of appeal have become adept at screening and moving weaker cases rapidly, without oral argument or protracted procedures. Moreover, the danger of expending time twice exists: first to consider whether to allow review, and later, if review is allowed, to decide the case.

On the other side, a certiorari procedure can be tailored almost infinitely to the needs of the system. If the caseload were overwhelming, the grant or denial of certiorari could be turned into a less sensitive process. The judges would not be obliged, as they are when handling a true appeal, to satisfy their consciences that they approve or disapprove of a particular outcome. "certiorari denied" could simply mean: "We don't have room, and your case seems less troublesome than others."

Conceivably certiorari could be combined with procedures such as truncated review of a colleague's case by a panel of judges operating as an appellate division of the district court.<sup>112</sup> The difficulty with such a procedure would, again, be that the administrative costs, and judge-time, could well be greater than the fast-track time presently spent by a circuit court on many of its cases.

One thing is clear. While the Supreme Court has never held that an appeal is constitutionally required, the federal system and virtually all state systems now provide one appeal

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112. M. Pollak, *Amici Curiae*, 56 U.Chi. L.Rev. 811 (1989) (Book Review).

as of right to all litigants. Change of that tradition, even if in the civil area alone, would be a major transition in our philosophy. It might conceivably become a needed step if the costs of providing an appeal in each case become too high. But the screening and tracking techniques now used by appellate courts may be adequate. The Committee sees adoption of certiorari review as an action of last resort, and does not recommend it. It should, however, be studied because it is an obvious alternative to building a costly, more elaborate appellate structure should caseload pressures prove intractable.

## 2. Alternative Court Structures

The Committee reviewed four types of structural proposals (besides retention of the present format). Each type has many possible variations, and, as members of the Committee noted, it is possible also to meld types.

Type I. Multiple Small Circuits. To return to collegial small circuits, the present circuits would of necessity have to be eliminated and entirely new circuits drawn, limited to nine or ten judges each. Problems of geography might be troublesome; indeed, some states, like California, might have to be split. To cope with future caseload growth (such as that which overtook the Eleventh and Fifth Circuits only a few years after their division), a mechanism might be developed for examining and, if needed, redrawing circuit boundaries every decade or so in order to maintain a proper size.

The problem with any such restructuring, as noted above, is how to control the increase in intercircuit conflicts generated by an increased number of circuits.

One suggested method would be to require all circuits, on a national basis, to adhere to the precedent established by panels of other circuits, except, of course, where the Supreme Court has spoken. However, a rule of national *stare decisis* must allow for the reversal of decisions of other panels believe to be clearly erroneous. One method proposed is to create intercircuit review panels that would have the power to resolve conflicts between the circuits (subject to Supreme Court review). Another option would be to grant nationally binding status, in certain circumstances, to the opinion of the en banc panel of a particular court. The important point about arrangements of this type is that judges from the circuits themselves would be utilized, in some formalized manner, to issue pronouncements binding on colleagues beyond their own circuits. Intercircuit conflicts could thus "be cut off at the pass," without total reliance on the Supreme Court as the sole arbiter. Note that under this scheme, no "second tier" or



other formal court structure between the courts of appeals and the Supreme Court would exist.

Type II. A Four-tier system. Perhaps the most obvious structural way to accommodate more judges is to add an additional tier of courts. The present system has three tiers (trial, circuits, Supreme Court). An expanded system might have four (trial, appellate I, appellate II, Supreme Court). It is commonplace in business and governmental structures when too many people are reporting to "the Boss" (here, the Supreme Court) to reduce those who report directly, and make the others report "through" them. This concept has led many states to create a tier of intermediate appellate courts. The same could be done federally. For example, twenty or so circuits, of convenient size, could comprise a bottom tier. The upper tier would consist of four or five "higher" tribunals, each located in a different part of the nation and consisting of perhaps seven judges each. Each new upper tier court would hear cases on a discretionary basis from four or five of the circuits. An advantage of this system might be its tendency to focus the primary law-declaring (as opposed to error-correction) function within the four or five upper tier courts. Thus a more compact body of primary precedent would replace the voluminous and perhaps increasingly disparate case law that 200 or 300 co-equal circuit judges, governed only by a distant Supreme Court, would generate. With Supreme Court review becoming relatively rare, the new upper tier would have an important supplementary role. This system would also constrain unbridled intercircuit conflicts but in a non-mechanical way. Ample "percolation" would continue. Such a system could readily absorb the new judges that the system needs, would enable all the individual courts at both levels to remain small, and yet would preserve coherence. There is some concern that two tiers may make it harder to attract able jurists.

Type III. National Subject Matter Courts. Another alternative is to create national subject-matter courts that would serve to relieve the regional circuits of much of their current caseload. In the American Bar Standing Committee on Federal Judicial Improvements March, 1989 Report,<sup>113</sup> the majority recommends what it calls "nonregional appellate courts defined by subject matter," principally, a national court of tax appeals and a national court or courts to hear administrative appeals. Subject matter panels in the regional circuits are also recommended. Obviously, a significant advantage of subject matter courts of appeals is that they would eliminate

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113. The United States Courts of Appeals: Reexamining Structure and Process after a Century of Growth (1989).



intercircuit conflicts, provided all appeals of that type can be handled by one upper-level subject-matter court.<sup>114</sup>

While many bar leaders and judges oppose what they call "specialist courts," the concept is not so limited but includes courts like the Federal Circuit and, in some areas, the D.C. Circuit, which are composed of generalist judges whose jurisdiction is defined, at least sometimes, by the subject matter of the cases. The existence of these and certain Article I courts indicate that subject matter courts already have a recognized place among the country's judicial institutions.

However, the Committee has difficulty viewing subject matter tribunals as providing major relief for the present courts of appeals. If the elements of the ABA standing committee report were adopted, they would affect only a small portion of the caseload. And a wider creation of subject matter courts would, in our view, raise numerous political and organizational issues. The concept is nonetheless worthy of continuing research and study, especially as certain types of cases undoubtedly are best handled by subject matter tribunals. For example, an Article I tribunal to handle all entitlement appeals such as Social Security,<sup>115</sup> Veterans' benefits, and the like, seems well worth considering.

Type IV. A Unified Court of Appeals. Another proposal has been that all courts of appeals be merged and administered as a single national body. The Committee has examined a model of such a consolidated enterprise. It presents an enormous and complex picture. Our concern as to such a structure is that it might possess the faults typical of a central bureaucracy.

The semi-autonomous circuit courts of appeals, and the district courts, have responded with considerable initiative to a rising tide of demands over the last twenty years. We believe that this initiative stemmed in part from the feeling of judges and administrators in particular locales that the challenge was a challenge of their own, requiring their own response. Had they been part of a nationwide bureaucratic structure, the commitment might have been less. The modern trend in the federal courts, of which we approve, has been towards decentralized administration. A move towards an administratively centralized court of appeals is a move in the opposite direction.

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114. See also Meador, A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Court of Appeals, 56 U. Chi. Law Rev. 603 (1989).

115. See our recommendation on Social Security Reform.

ministratively centralized court of appeals is a move in the opposite direction.

Of course, a nationwide entity does have its advantages, one of which is the ability to divert judges and resources to courts of particular need. Another advantage is the elimination of intercircuit conflicts. A feature of the unified model presented to the Committee is to distinguish between panels handling routine, fact-specific disputes and those handling cases where law-declaring would be required. Only in the latter class would opinions be written.

Type V. "Jumbo" Circuits. It has been suggested by Judge J. Clifford Wallace that the current circuits should be reduced to several "jumbo" courts.<sup>116</sup> He notes that this structure would curtail intercircuit conflicts (there would be fewer circuits) and allow the larger circuits to more easily shift resources within their borders. Such a system might call for the creation of intracircuit divisions, would require small en bancs to function effectively, and might well require further innovations -- such as strengthening the en banc so as to transform it into something closer to a supervisory court within a court. If the nation were divided between, say five "jumbo" circuits, the structures created within each circuit might have the effect, when added together, of creating, nationwide, something like the two-tier regional system described under Type II.

There are endless variants on the above five types: we think, however, that they suggest in a general way the alternative concepts that are available. In the recommendation which discusses intercircuit conflict section, in discussing the control of intercircuit conflicts, we refer to a pilot study aimed specifically at resolving conflicts in the current system.

### 3. Retaining and Managing the Present Circuit System

As indicated above, we would not choose to create from scratch the present courts of appeals. Not only are their sizes and territories incompatible and quixotic, but their composition and style bear little resemblance to the small, unitary courts that came before them. Yet, some find comfort within a familiar structure. The circuits so far have done extremely well in managing their growing caseloads. Also, they have all coped well with a steady increase in size.

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116. The Nature and Extent of Intercircuit Conflicts: A Solution for a Mountain or Molehill, 71 Cal. Law Rev. 713, 940-41 (1983).

The fact must be faced, however, that a continuance of present caseload trends must inevitably transform most if not all circuits to "jumbo" units having 20, 30 or 40 judges. And this will occur within several decades, or even sooner. (Or -- unless appeals of right are replaced by discretionary appeals -- the courts will simply become bureaucracies where staff, not the judges decide most cases.)

If the current structure is retained, we have no doubt that the circuits will be obliged to turn to small en bancs, as in the Ninth Circuit. As larger circuits, they may also wish to create divisions, and experiment with the concept, not yet adopted by the Ninth Circuit, of rotating judges within a particular division. They may also wish to consider developing a "flagging" system where an assigned staff notifies judges of perceived intracircuit conflicts. And as already noted, the small en banc court may eventually become, in effect, a higher court-within-a-court. These and other innovations might eventually make it possible for the present circuits to function with a number of cases and judges exceeding anything we can presently imagine. They will, however, bear little resemblance to the courts of appeals known in the past. It may be that in the end, as has the Ninth Circuit, we find that "jumboism" works.

If, after study, the status quo is favored, we have no doubt that the larger circuits will turn to small en bancs, as has the Ninth Circuit. As larger circuits, they may also wish to create divisions, and experiment with the concept, not yet adopted by the Ninth Circuit, of rotating judges within a particular division. They may also wish to consider developing a "flagging" system wherein assigned staff notifies judges of perceived intracircuit conflicts. These and other innovations eventually may make it possible for the present circuits to function with a large number of cases and judges.<sup>117</sup>

Separate Statement of Mr. Aprile, Judge Cabranes and Mrs. Motz:

No one disagrees that this subject deserves serious study in the years ahead. The various proposals noted in the text have not been approved by the Committee. Some are, to say the least, controversial. Comments by concerned citizens on these proposals, and on the utility of including a reference to them in the Committee's final report, will undoubtedly inform the Committee's consideration of these questions in early 1990. We hope to hear from the bar, the bench and law teachers regarding these proposals.

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117. See Lay, *The Federal Appeals Process: Whether We Goest? The Next Fifty Years* (1988) (unpublished paper).

## COURT OF APPEALS - THE RISE OF INTERCIRCUIT CONFLICTS

- Congress should authorize an experimental pilot project, lasting over a four year period, monitored by a committee of the Judicial Conference of the United States.

Much concern has been expressed over the rise in intercircuit conflicts. It is recommended that Congress authorize the Supreme Court to refer down to an en banc court of appeals not involved in the conflict a case presented to it by certiorari petition for final disposition of national precedent on the conflict issue.<sup>118</sup> The referral would be on a random basis that would preclude the Court from knowing the recipient of the case before the referral decision was made. The Committee suggests that such a plan include the following points:

- a. The en banc proceeding to resolve an intercircuit conflict should take place in a circuit not involved in the conflict.
- b. The Federal Rules of Appellate Procedure should be amended to establish uniform procedures and time limitations to govern the transmittal of each case from the Supreme Court to the circuit court for en banc review of the conflict issue. For all other purposes, including size and composition of the tribunal, a circuit court of appeals receiving a conflict referral from the Supreme Court shall employ its established en banc procedures in the disposition of the conflict issue.
- c. The Supreme Court should be able to refer any case to such a circuit en banc conference before or after granting or denying certiorari or before or after noting probable jurisdiction of an appeal. The Supreme Court should have authority to direct such an en banc circuit conference to decide any case so referred which is subject to review by appeal.
- d. The decision of the en banc circuit court on the designated conflict issue will be final subject only

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118. Provided decisional conflicts referred to a circuit en banc conference shall only involve conflicts arising between the decisions of two circuit courts of appeal over a question of federal statutory interpretation. A conflict between a decision of a circuit court of appeals and the highest court of a state may be resolved only by direct review by the United States Supreme Court.



to the right of the party adversely affected by the decision to seek reconsideration or rehearing of that ruling by the Supreme Court within thirty days from the date the en banc opinion was rendered by the circuit court. No response to such a reconsideration motion will be permitted unless requested by the Supreme Court.

- e. Unless modified or overruled by the Supreme Court, decisions of a circuit en banc conference of any circuit, when the case has been so referred by the United States Supreme Court, should be final decisions and binding on all courts of United States, and, with respect to questions arising under the constitution, laws, or treaties of the United States, on all other courts.<sup>119</sup>

In the first half of the 1900's, the Supreme Court easily fulfilled its role of fashioning law for the entire nation. As recently as 1960, the Supreme Court reviewed approximately three percent of all federal appeals. That proportion has dropped to less than .5 percent, and will continue to drop as the total number of appeals rises. The Supreme Court handles roughly 150 or fewer cases annually with approximately .75 percent<sup>120</sup> flowing from the federal courts of appeals. This figure has remained constant for some time, with little prospect of a major change. While some commentators suggest that the Supreme Court could increase its output, given the difficulty of the cases that the Court hears, we are not persuaded.

The relative capacity of the Supreme Court vis-à-vis the courts of appeals is important because under the Evarts Act system the Supreme Court is the sole arbiter of conflicts. Sitting at the apex of the federal and state systems, the Court's role is to harmonize the federal law coming from both

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119. This mechanism is adapted from the one originally suggested by Judge J. Clifford Wallace in 1983. See Cal. L. Rev. 913, 935. We adopt the recommended proposal because it relies entirely on existing court resources without necessitating any structure that might renew the heated debate regarding the Hruska proposal and its progeny.

120. In the 1989-90 term the Court appears to be taking a somewhat smaller number. Greenhouse, N.Y. Times A-1 (Nov. 28, 1989).



types of courts, including the regional courts of appeals.<sup>121</sup> Yet, the Supreme Court has long since given up granting certiorari in all cases involving intercourt conflicts. Thus, a congressional statute may mean one thing in one area of the country and something quite different elsewhere.

Because of the perceived need for greater capacity to resolve intercourt conflicts, the Hruska Commission, in 1975, urged the creation of a new National Court of Appeals, intermediate between the Supreme Court and the circuits. Under the Hruska Commission's plan, the Supreme Court would refer 150 cases a year "down" to the new tribunal, thus doubling the system's capacity to determine federal law on a nationwide basis. The Hruska Commission plan never reached fruition and subsequent proposals for a similar body, including one manned by existing circuit judges, have been unsuccessful. But the problem of intercourt conflicts has not gone away.

The Committee does not renew the Hruska Commission's recommendation for a new National Court of Appeals. We do, however, urge the importance of achieving as soon as possible a full understanding of the impact on our system of the growing number of unresolved intercourt conflicts. All conflicts are by no means bad: they may serve as a useful means to develop legal doctrine and insight. However, a judicial system that cannot, within a reasonable time, provide a nationally binding construction of an Act of Congress in instances where national uniformity is important would seem flawed.

The difficulty in assessing the extent and seriousness of intercourt conflicts stems from a lack of comprehensive data. Some valuable work has been done, but a full study requires resources beyond those of the individual scholar. Jeffrey Barr has synthesized for the Committee the literature and research to date. Extrapolating from findings by several researchers, he estimates that the Supreme Court refused review of roughly 60 to 80 unresolved "direct" intercourt conflicts that were presented to the Court by petitions for certiorari in 1988. This number does not include cases involving less direct conflicts (e.g., fundamentally inconsistent approaches to the same issue).

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121. As Professor Meador writes:

". . . [T]he Supreme Court remains the only institutional means through which this vastly increased outpouring of decisions can be harmonized and made uniform throughout the nation." 56 U. Chi. L. Rev. 604 (1989).

Barr emphasizes that the numbers tell only part of the story: "One can only gauge the need for federal court restructuring to deal with this problem by scrutinizing the conflicts and deciding which are important or 'intolerable' and which are not." Barr identifies several factors as relevant to distinguishing "intolerable" conflicts from those that are not. These factors include:

(1) Where a split in the law creates economic costs or other harm to multi-circuit actors, such as firms engaged in interstate commerce. An interstate business regulated under federal law is likely to be adversely affected by non-uniform construction of the law. Although the particular law may not be important enough to interest the Supreme Court, the economic effects of unresolved conflicts may be quite harmful. Problems of this nature are not always evident to a judge or to a trial lawyer. The adverse consequences are felt in the planning and execution of business transactions, or in their avoidance. Some congressional enactments demand a more uniform national interpretation than others do; yet, the Supreme Court does not always provide uniform review. For example, Professor Turley found that the Supreme Court had been more willing to resolve conflicts under the Longshoremen and Harbor Worker's Compensation Act ("LHWCA"),<sup>122</sup> a statute for which Congress did not regard national uniformity as so important than under COGSA, where conflicts are so harmful that any resolution (even the wrong one) may be better than none.

Significantly, two organizations that have urged this Committee to address the problem of intercircuit conflicts represent firms engaged in interstate business activities. The Maritime Law Association has identified eight intercircuit conflicts which, until resolved, will adversely affect the clients of its members who engage in maritime commerce. Similarly, the International Association of Defense Counsel, representing Members of the (civil) defense bar, complain that "intercircuit court rivalry is [a problem] which touches all of us representing clients who engage in business in many states."

(2) Prevention of forum shopping. Conflicts may encourage forum shopping, especially since venue is frequently available to litigants in different fora.

(3) Fairness to litigants in different circuits. Certain laws may seem especially unfair if different interpretations result in benefits to persons in one circuit that are denied in another.

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122. See M.S. Turley, "Observations on the Supreme Court's certiorari jurisdiction in Intercircuit Conflict cases", 67 Texas L. Rev. 1251 (1989).

(4) Avoid problems of non-acquiescence by federal administrative agencies. When courts of appeals conflict in administrative agency cases, the agency is forced to choose between the uniform administration of its statutory scheme and obedience to the different holdings of two courts in different regions. While the Solicitor General can usually obtain review of a particularly serious issue of this type, it may sometimes be more wise for him to let an agency "work around" smaller issues of this nature. The agency may be led in some situations to disregard the holdings of the federal court in similar cases, an approach which breeds disrespect for the law. The General Counsel of the Department of Health and Human Services listed a number of conflicts among the circuits in the interpretation of Social Security law. Some involve sums so small "as to be unrealistic vehicles for seeking a writ of certiorari."

We agree that some conflicts are in greater need of rapid resolution than others. In theory, of course, all federal law should be uniform. Conflicts involving many procedural rules, and laws affecting actors in only one circuit at a time, however, may have a negligible effect. We realize that some commentators believe that, while harmful conflicts can and do exist, the Supreme Court can handle them. But Barr's study suggests that the problem is a larger one. Our concern was also raised by the complaints of the Maritime Law Association and others. Finally, the reasoned contrast between today's mounting numbers of appeals and the relative minuscule size of the Supreme Court's stable docket suggests that all conflicts cannot reach the Supreme Court. Conflicts in high profile areas may reach the Court, but surely our legal institutions should be able to provide a single, nationwide rule of interpretation for any federal statute where national uniformity is desirable within a reasonable time.

There should be a study of the number and frequency of unresolved conflicts, coupled with an analysis of how many of them are truly "intolerable." We need to know how many "intolerable" conflicts our system is generating which are unlikely to be resolved by the Supreme Court.

Although necessary, a study alone will only generate further debate and postpone a solution. Therefore, we propose that the study be accompanied by the pilot project described above. By putting mechanisms in place designed to resolve real conflicts, we can expect to develop a practical understanding of the problem and likely solutions. In particular it will be possible to find out whether there are many conflicts which, although unsuitable for Supreme Court review, deserve national resolution at another level. In designing such a pilot project, we have avoided recommending any new structure

reminiscent of the controversial new court recommended by the Hruska Commission.

Congress should authorize an experimental pilot project for a four-year period. We accordingly ask Congress to authorize the Supreme Court to participate in the experimental pilot project for a four-year period as described at the beginning of this section. The project should be carefully monitored by a properly staffed committee of the Judicial Conference. That Committee should tabulate and evaluate conflicts on a national basis and recommend whether the experiment should be continued, modified, or discontinued after four years.

There may be some concern about the additional workload the "en banc" procedures would mean for the courts of appeals. However, while the absolute number of conflicts each year may exceed 60, we assume that the Supreme Court will refer a much smaller number for purposes of this pilot project. In the enabling legislation Congress might consider authorization for the purpose of the project more liberal use of the reduced en banc provisions now followed in the Ninth Circuit.

The Committee also recommends, apart from the pilot project that when a court of appeals reviews a case raising an issue already decided by another circuit, considerable respect ought to be accorded the earlier decision and a panel contemplating disagreement with the panel of another circuit ought to circulate its draft opinion among the remaining judges of the court for their comments.

#### Separate Statement by J. Vincent Aprile, II:

To minimize the cost to litigants to reduce delays in the appellate process, to foster finality, and to avoid unnecessary relitigation of issues, the Supreme Court's decision to refer a conflict issue to an en banc circuit court of appeals for resolution of the conflict issue should terminate its involvement in the disposition of that particular case. Once the Supreme Court refers a case to an en banc circuit court of appeals for final disposition of the conflict issue, the Supreme Court should be prohibited from reviewing the decision of the en banc tribunal. The Supreme Court should only be able to reverse the precedent generated by the en banc court of appeals in the context of another case after granting certiorari to review the ruling's application in a successor case.

Basically, the committee's proposal is advanced to assist the Supreme Court, to reduce the circuit courts' workload, and to provide uniformity in the interpretation of federal statutory law which should generate benefits to litigants and



litigators within the federal court system. In this spirit, the substitution of an en banc circuit court as a replacement for the Supreme Court to decide a statutory conflict issue should not constitute another layer of appellate review, but should be seen as an alternative to a disposition on the merits by the Supreme Court.

To allow the losing party to revive the Supreme Court's interest in the conflict issue, even through a reconsideration motion, extends unnecessarily the appellate litigation process to the detriment of both the litigants and the judiciary. To require a federal circuit court to convene en banc to resolve a conflict between circuits and to promote uniformity of federal law appears reasonable when the en banc decision will put at least a temporary resolution to the interpretation issue. Such a referral procedure appears unnecessarily duplicative when the losing litigant and litigator are permitted to persuade the Supreme Court that the national precedent rendered by en banc tribunal is incorrect and should be reversed immediately by the Supreme Court through a reconsideration process (in a court where no initial consideration of the issue's merits had ever occurred).

Finally, there is merit to a proposal, particularly an experimental one, that truly requires the Supreme Court to select from three disparate options with no escape clause to allow the Supreme Court to resurrect its once abandoned jurisdiction over a case. When the Supreme Court denies certiorari and reconsideration of that denial where appropriate, that case ceases to be available to the Supreme Court as a vehicle for resolving issues of law. Similarly, under this proposal, the Supreme Court's decision to refer the conflict issue to an en banc tribunal for resolution should be a choice between keeping the case by granting certiorari to resolve the question or confidently delegating, at least in the context of this case, the ultimate resolution of the conflict issue to another court with no expectation of or potential for reassuming jurisdiction over that matter. There should be a cost, albeit small, to the Supreme Court's decision to employ this alternative means of resolving conflicts. Loss of jurisdiction over the controversy is an appropriate cost to the Supreme Court which also lends greater dignity and importance to the function of the en banc tribunal in this experimental procedure.

In view of the experimental nature of this proposal and the concerns expressed elsewhere in this report about the caseload of the federal court of appeals, the proposal should limit the Supreme Court's referral capacity to not more than forty cases per year. Such a limitation precludes the en banc procedure from becoming a logistical or administrative burden to the federal circuits while insuring that the Supreme Court's



#### D. LONG RANGE PLANNING IN AND FOR THE FEDERAL COURTS

- The Judicial Conference should establish a strategic planning capability. While the precise organization of such a capability should be left to the Judicial Conference, the needed research staff should be located within the Federal Judicial Center. The overall direction and control of strategic planning for the judiciary and of the work of the research staff should be vested in a subcommittee of the Conference's own Executive Committee, under the ultimate authority of the Executive Committee and of the Conference itself. The research staff located within the Federal Judicial Center should have access to experts and groups outside the Judicial Branch and should aim to become a facility of outstanding quality.

The volatility of change throughout our society has made long-range planning a subject of increased importance in all areas. The judiciary, as a body, has never been well-equipped to focus on down-the-road problems because the judges who comprise it must attend to overwhelming day-to-day responsibilities that consume their time.

This is not to say that some excellent planning has not been performed by the Administrative Office of the United States, the Federal Judicial Center, the committees of the Judicial Conference, and the court administrators. Soon to be introduced legislation that would enable the judiciary to take greater initiative in space and facilities management,<sup>123</sup> is one such example. And, recently, the Director of the Administrative Office established a planning office to help guide its operations.

Yet, the rate of change has, if anything, accelerated. The exponential increase in case volume alone flags serious problems ahead. The federal judiciary no longer can afford to be solely reactive; it must acquire a better ability to recognize trends and future problems before they occur.

Currently, when planning needs surface, as signaled informally through congressional dissatisfaction, complaints of judges, or a complaint noted by the Chairman of the Executive Committee, the lack of resources in-house sometimes becomes a problem. The Federal Judicial Center is statutorily authorized

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123. See legislation entitled The Judicial Space and Facility Management Improvement Act, which should be introduced of the U.S. Senate in early 1990.

to perform a planning function. It could be, and in a small way is, the judiciary's "think tank", but has few resources, and traditionally has considered itself to be required to invest its time in projects of narrow, well-defined scope. At present, then, most operational planning is done in the Administrative Office. Outside consultants occasionally have been hired to study problems that the judiciary lacked the resources to investigate.

Thus, no one person or entity takes on the mantle of forecasting emerging problem areas and developing methods for avoidance or mitigation of those future problems. In a sense, this Committee is a preliminary effort to fill that void. Of course, such periodic high-level policy reviews should continue but in greater depth than our resources permit. No occasional effort can provide the information and insights that are needed on a continuing basis.

The need for such a unit is obvious, yet we face two vexing questions that must be answered prior to establishment. First, the new unit must have a defined role different from other planning organs of the federal judiciary in order to avoid overlap and jurisdictional disputes. And when such overlap and jurisdictional disputes do arise, as they will, a central authority, representing the judiciary as a whole, must be authorized to settle them.

Second, the unit must be carefully positioned in such a way that its efforts are sufficiently isolated from day-to-day management so that its resources are not expended on short-term issues. On the other hand, it must have sufficient contact with operational units so that its work is not abstract and that its proposals find their way efficiently into the mainstream of judicial planning and operations.

With these two concerns in mind, the Committee offers the following conception: The long-range planning unit should concern itself with matters related to the overall activities of the federal judiciary rather than isolated problems. Thus, it should develop policy proposals capable of broad application and should not be concerned with specific and isolated problems.<sup>124</sup> It should, for example, be concerned with the

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124. Examples may help to illustrate this definition. A long-standing concern about intercourt conflicts is recognized, yet no individual has ever been charged with the responsibility for gathering the data necessary for understanding that problem or for proposing solutions to it. A long-range planning group, we think, would appropriately consider this. Other areas ripe for long-term study include the education of  
(continued...)

manner in which the judiciary proposes and plans for the addition of new judgeships; it should not be concerned with the need for a new judge in a particular district or the need for a courtroom for that particular judge's use.

The entity should be housed in the Federal Judicial Center. As noted, the Center already has in its charter the task of long-range planning; it was felt that no new legislation would be required if the entity were placed there. Moreover, placement in the Center is more attractive than the Administrative Office because the Center is a more independent entity; placement in the Administrative Office, it was thought, might lead to an emphasis on concerns related to day-to-day operational difficulties. It is vital that the entity have ready access to the rich research capabilities of the Federal Judicial Center.

Concern was raised, however, that a planning unit in the Center would be so isolated as to be impotent. The Center with its independent board is deliberately and appropriately outside the machinery of the Judicial Conference. Since the planning unit would of necessity need to have close association with the Conference and its committees, such isolation was thought unwise.

Accordingly, if the planning entity contemplated were to be integrated within the system as a whole, the Judicial Conference, must be in a position to determine what issues to assign to it, and what to assign elsewhere. The Conference's Executive Committee is, in our view, the logical body to handle this allocative function. While the personnel of the Center and its research standard would be subject to the control of its own Board, thus ensuring independence, the determination of what planning functions to assign to it would be up to the Executive Committee, or perhaps more properly to a subcommittee charged with oversight of strategic planning in the judiciary.

Thus, what is needed, is a new unit, free from the demands of operational units. Administratively, its research arm should be placed in the Center and have ready access to the research capabilities of the Federal Judicial Center. It should also establish scholarly relations with outside planning

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124. (...continued)

trial judges as to science and technology matters. Also, basic questions about the operations of the public defenders system have been put before this Committee. We have, in response, proposed a major study of this area. A long-range planning unit might have the capacity to serve as a major resource for such a study.

and research groups. To provide access to the operational machinery of the judiciary, it should report directly to a subcommittee of the Executive Committee of the Judicial Conference, rather than to the board of the Federal Judicial Center. That subcommittee, charged with strategic planning, should include representation from both the Federal Judicial Center and the Administrative Office. It might also include representation from one or more major committees of the Judicial Conference and, most importantly, should have access to persons outside the judicial branch who may be of assistance in formulating policy.

#### **E. OFFICE OF JUDICIAL IMPACT ASSESSMENT (OJIA)**

- ▶ An Office of Judicial Impact Assessment should be created in the Federal Judicial Center. That office would be charged with advising Congress on the resource impacts of proposed legislation as well as offering technical assistance on drafting matters likely to unnecessarily lead to litigation. The work of this Office must be closely coordinated with the Office of Legislative and Public Affairs, perhaps by having the latter office serve as the conduit for communications.

Congress should create an entity within the Judicial Branch that would provide information to Committees and staffs on the effect of proposed legislations on the judicial branch. The Judicial Conference and the Administrative Office devote significant resources to legislative matters. Of necessity, these efforts are focused on those bills that are sponsored by the judiciary or that directly impact on the operations or budget of the judiciary. These efforts, particularly in recent years, have been commendable, but we believe that an additional element is needed to supplement this program.

Much of the caseload spiral of recent years has resulted from the passage of a broad range of statutes that have specifically created or implied new causes of action. The creation of a new cause of action is entirely within the province of the legislative branch. However, the judiciary is charged with the duty of providing a forum for these cases. Because of that duty, it is appropriate and useful for the judiciary to advise Congress of the impact that proposed legislation will have on the judiciary and the need, if any, for additional resources to carry out the legislation. For Congress to view such information as acceptable and useful, the supplier must be seen as being an objective entity.

In the past, the judiciary has proposed that judicial impact statements be required. We believe that the objectives of that proposal can be achieved by creating within the



judiciary itself an office devoted to judicial impact assessment. This office ought to be located in the Federal Judicial Center but must of necessity operate in coordination with the Office of Legislative and Public Affairs at the Administrative Office. The advantage of placing this office in the Center is that it would be separate from operational entities. The danger in such a structure is the risk that the judiciary would speak to the Congress with two voices, resulting in harm to both branches.

To avoid that danger, we believe that the office should be structured so that it would not be allowed to speak independently to Congress. For instance, Congressional requests for impact assessment could be routed through the Legislative and Public Affairs Office as could the return impact assessments. The Legislative and Public Affairs Office would not serve as a censor in either direction but could, for instance, advise the impact assessment office of prior Administrative Office studies on the subject or Judicial Conference positions on the issue in order to avoid duplication or ambiguity.

The office would not endorse or condemn legislation. It would confine itself to an analysis of the impact of the legislation. That impact assessment would often be in the form of needed resources. In addition, though, the office could advise the Congress of drafting defects that might unnecessarily breed litigation (such as a lack of a statute of limitations or uncertainty as to whether a private right of action was intended). Finally, the office would supply assessments useful to the Judicial Conference Committee on long-range planning discussed.

The congress may also find it helpful to develop its own resource for committees and staff seeking information on the impact of potential legislation on the Federal Judiciary.



## **V. Other Significant Issues**

### **A. ENSURING FREEDOM FROM BIAS AND DISCRIMINATION IN THE JUDICIAL BRANCH**

#### **1. Discrimination Complaint Procedures**

- ▶ **The Judicial Conference should amend the existing Discrimination Complaint Procedures to ensure that complaints of employment discrimination will receive an independent review outside the court in which the complaint arose. This independent review could be conducted by the judicial council of each circuit, by a designee of the judicial council, or by some other alternate reviewer within the judicial branch of the government.**

The federal judiciary can be justifiably proud of its role in promoting civil rights and equal employment opportunity throughout this nation. Nevertheless, the proud history of the federal courts must not blind us to the potential for invidious discrimination. Nowhere is this more true than in the area of employment. The judicial branch currently employs thousands of men and women in all manner of staff positions; there can be little doubt that in a system so large there is a potential for abuse and discrimination. Accordingly, the confidence of employees and the nation at large must ultimately rest on the existence of procedural safeguards designed to eliminate discrimination and misconduct within the judicial branch.

The Model Plan currently employed by the Judicial Conference and the federal courts seeks to provide for the prompt review of complaints of invidious discrimination including complaints of restraint, interference, coercion, discrimination, or reprisal. Under the existing procedures, the Court's Equal Employment Opportunity Coordinator first attempts to resolve the complaint informally and may conduct any investigation deemed necessary. The Coordinator then files a report on the matter with the Chief Judge of the Court and, if either the complainant or alleged discriminatory official objects to the findings of the Coordinator, the objecting party may file with the Chief Judge a written request of review. The Chief Judge will conduct any further proceedings deemed necessary and will determine the appropriate resolution of the complaint. The decision of the Chief Judge is final and may not be appealed.

Although this procedure appears to have been successful over the years, the complete lack of review by a person somewhat removed from the situation is arguably a cause for concern. Indeed, it is not difficult to imagine a situation in which a fact-finder's impartiality and judgment might be clouded or questioned due to over-familiarity with the parties -- one or both of whom he or she may have appointed -- or allegiance to the Court and its officers. The opportunity for an independent review made from outside the court in which the complaint arose could effectively eliminate this possible problem.

Perhaps the most promising choice for the role of independent reviewer would be a committee of the circuit's judicial council, which would enjoy the double advantage of being both familiar with and independent from the court and personnel in question. However, the Judicial Conference has been reluctant to impose additional responsibilities on the judicial councils and has twice rejected proposals of this sort. We recognize the concerns of the Judicial Conference and acknowledge the significant burdens of time and expense imposed by such a system of outside review. Nevertheless, it is important that we recognize the need for the sort of review in the discrimination complaint process that will bolster the confidence of judicial employees and reinforce the proud heritage of the federal judiciary.

In an effort to avoid undue additional burdens on already overtaxed active judges, we suggest that the judicial councils appoint a review panel with a rotating membership comprised of district court judges and circuit judges. This will effectively prevent any single judge or group of judges from bearing the full burden of outside review. Moreover, we suggest that the judicial council and/or panel be empowered to appoint any judicial officer within the circuit (but outside the court in which the complaint arose) to investigate and/or resolve grievance complaints.

## 2. Grievance Procedures.

- In addition to providing for independent review of discrimination complaints, the Judicial Conference and judicial councils of the circuits should also establish a set of informal grievance procedures to handle and resolve other, less serious complaints.

Almost fifteen years ago, the Administrative Office of the United States Courts drafted a set of model grievance procedures for employees in the administrative

office.<sup>125</sup> The majority of courts continue to have no apparatus for addressing and resolving the concerns and complaints of federal judicial employees. We believe that the use of such procedures is good practice in any organization, including the judiciary. They would effectively promote efficiency and respect for the administration of our nation's courts, and we believe that they could be implemented easily and quickly in all but the smallest of our courts. Accordingly, we recommend that all circuits consider adopting such systems wherever appropriate.

### 3. Education.

- The Judicial Conference of the United States, the Federal Judicial Center, and the judicial councils of the various circuits should continue and expand their efforts to educate judges and other personnel of the Judicial Branch of the existence and dangers of racial, ethnic, and gender discrimination and bias.

Ours is a nation committed to the principle of equality under the law. For this principle to be more than an aspiration -- for this principle to become a reality -- we need more than good laws. We need to be able to continue to count on good judges as well. Studies in many state systems reflect the presence of bias -- particularly gender bias -- in state judicial proceedings. Although we have confidence that the quality of the federal bench and the nature of federal law keep such problems to a minimum, it is unlikely that the federal judiciary is totally exempt from manifestations of this general social problem.

In view of the existence of numerous state studies on bias in the courts, we believe it would be unproductive to recommend yet another study. Instead, we prefer to move directly to the proposal of means of preventing and dealing with bias in judicial proceedings and in the operations of the Judicial Branch of Government. Although formal disciplinary procedures may sometimes be a necessary and appropriate response within the Judicial Branch, in most instances they will prove an overly blunt and clumsy instrument. We look to judicial education as the best means of sensitizing judges to their own possible

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125. Memorandum of R. Glenn Johnson, Chief, Personnel Division, Administrative Office, dated June 1, 1988, announcing approval of Administrative Grievance System for the Administrative Office of the United States Courts.

inappropriate conduct and to the importance of curbing such bias when shown by attorneys, parties, and witnesses. To this end, we ask the Federal Judicial Center and circuit conferences to continue and expand their educational efforts.

Judicial education should not, however, end with orientation or yearly circuit conferences. Judicial education should be a life-long process and pursuit. We should never underestimate the power of informal peer pressure. The federal judiciary is a relatively small and collegial body; individual judges can and should make the aspiration of "equality under law" into a living reality.

#### **4. Complaints Concerning Bias.**

- ▶ The judicial councils of the circuits should consider establishing in each district and at the circuit level grievance procedures to handle and resolve complaints by members of the public concerning allegations of inappropriate treatment by personnel of the Judicial Branch, including allegations of racial, ethnic, religious or gender bias.

Despite educational efforts, on some occasions members of the public may have complaints about actions of personnel of the federal judicial system. In some instances, existing discipline mechanisms are available for such complaints and no new mechanisms are needed. Where there are no extant mechanisms, however, appropriate procedures to consider such complaints are an important feature of our commitment to equal treatment.

#### **B. PUBLIC AND MEDIA ACCESS TO THE COURTS**

- ▶ In each circuit, either the circuit executive or an appropriate staff member should be designated as the media contact person and should receive training for that task. In addition, training for Chief Judges should include media contact training.
- ▶ "Press days" should be encouraged as a means of facilitating communication between the courts and the media.
- ▶ Programs and publications that enhance public understanding of the courts and their operations should be encouraged.



For the first forty-eight years of its existence, the Administrative Office lacked any type of public information services. Inquiries, particularly those from the media, were handled on an ad hoc basis, although many were referred to the Office of Legislative Affairs or to the Director's Office.

In 1987, however, a full-time Public Information Officer was hired by the Administrative Office and housed in what has become the Office of Legislative and Public Affairs. The Public Information Officer is responsible for handling the public information needs of the federal judiciary, as a whole, and that of the Judicial Conference, in particular. In addition, the Officer disseminates information to the courts and to the media through press releases and a newsletter. He also assists courts in organizing "press days" through which the media and court representatives meet to discuss and inform one another about their work, needs and concerns.

This structure seems appropriate in general but we also believe that it is worthwhile for the circuit executives to give greater emphasis to public information needs.<sup>126</sup> For example, many of the inquiries received by the Public Information Officer concern the activities of a particular court or judge. Accordingly, media relations should receive greater attention and emphasis in the regional circuits.<sup>127</sup> The mechanism for responding to the media inquiries should be decentralized, with part of the responsibility housed in the Administrative Office and part vested with the circuit executives.

### **C. INCENTIVES AND DISINCENTIVES IN CIVIL LITIGATION**

#### **1. Attorney Fee Shifting**

- The case for the general adoption of the "loser-pays" rule for federal court litigation has not been made.

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126. The issue of cameras in the courtroom, for example, was considered by the Committee. Rather than take a position on this issue, we chose to defer to the Ad Hoc Committee on Cameras in the Courtroom established by the Judicial Conference. We do note, however, that while much of the interest in this area has focused on the televising of trial proceedings, the televising of appellate court proceedings presents very different issues.

127. Statutory language is in accord: 28 U.S.C. 332(e)(8) states that the duties of a circuit executive shall include "representing the circuit as its liaison to the . . . news media . . . ."



A proposal sometimes made in response to court congestion or baseless litigation is the adoption of the English loser-pays indemnity rule on attorney fees. Making losing parties as a general matter fully liable for the winners' reasonable attorney fees, however, is a sweeping measure with several bad effects that can be avoided by more finely crafted approaches, including modifications of the general "American rule" against attorney fee liability that are targeted on specific problems. Many such modifications have taken place already, in forms consistent with American attitudes on avoiding excessive inhibition on access to justice.

Even the many industrialized democracies that, like England, formally follow the loser-pays rule often temper it substantially, as by imposing only partial liability, providing broad public legal aid, or making the rule inapplicable in significant classes of cases. Moreover, the indemnity rule works harshly in close cases, especially when a plaintiff was entirely reasonable in pursuing a claim that he ultimately loses. As a result, the rule may excessively discourage the pressing of plausible but not clearly winning claims, particularly when the prospective plaintiffs are risk averse -- as is likely to be true of middle class people with something to lose but not so many assets that they can tolerably afford to lose much. Furthermore, for cases in which the parties remain in disagreement on their assessment of the likely outcome of trial, the English rule can actually make settlement less likely -- other things being equal, it increases the negotiation gap between the litigants.<sup>128</sup> Loser-pays attorney fee shifting may be appropriate in some circumstances, such as discovery motions and in business litigation between well-financed adversaries (although such cases are often governed by state rather than federal law).

## 2. Sanctions for Litigation Misconduct

- Rule 11 sanctions for litigation misconduct should be studied further.

In the current atmosphere of controversy over amended Federal Rule of Civil Procedure 11 on sanctions for misconduct, the call in the recently completed Third Circuit Study of Rule 11 (that the study should be replicated in one or more other jurisdictions) should be heeded -- with dispatch--

before any major changes in the Rule are proposed. In light of evidence supporting concern about sometimes overzealous use

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128. References: Rowe, The Legal Theory of Attorney Fee Shifting, 1982 Duke L.J. 651; Rowe, Predicting the Effects of Attorney Fee Shifting, 47:1 Law & Contemp. Probs. 139 (Winter 1984)

of amended Rule 11, however, federal courts could do well to consider the cautionary recommendations of the Third Circuit study.<sup>129</sup>

The foregoing is not to blink at the controversy over amended Rule 11. It has both strong defenders and strong critics. The latter see it as escalating antagonism in litigation, creating satellite controversies, inhibiting innovative arguments and unpopular claimants, and sowing conflict between attorney and client. Defenders see it as an essential tool to curb substantial cost-inflicting abuses and are inclined to believe that much of the present litigation over Rule 11 is to be expected in early stages with any major change to such a new approach. The Third Circuit study reached mixed conclusions, finding that Rule 11 motions were made in only a small number (0.5%) of Third Circuit district court civil cases; that plaintiffs in general and civil rights plaintiffs in particular tended to be sanctioned at a higher rate than others; but that the Rule did appear to be having desired effects on pre-filing conduct of attorneys and contributing to settlements and dismissals. With the Rule already in place, we see expeditious but careful research along the lines of that already done in the Third Circuit study as essential to see if the criticisms of the Rule have substance, to aid in its interpretation and possible amendment, and to avoid overreaction to problems that some (but by no means all) members of the bar see in the Rule's effects.

Special consideration concerning post-conviction review suggest that, although habeas proceedings are technically civil, Rule 11 should perhaps be held inapplicable in such cases, See United States ex rel. Potts v. Chrans, 700 F. Supp. 1505, 1523-26 (N.D. Ill. 1988), or should be used "only in the most egregious circumstances" and when other remedies such as dismissal for abuse of the writ are inadequate. Anderson v. Butler, 886 F.2d 111, 144 (5th Cir. 1989).

### 3. Measurement of Attorney Fee Awards

- ▶ To simplify the process of assessing attorney fee awards, courts should (1) adopt reasonable rate schedules and uniform enhancement factors; (2) use magistrates or special masters as fee taxing masters; and (3) set advance guidelines for compensable items in certain cases. Also, a study should be conducted of alternatives to the "lodestar" method

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129. S. Burbank, Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (1989).

**of fee award setting, including percentage and hybrid hourly/percentage methods.**

Substantial concern exists that under the "lodestar" method of fee measurement -- multiplying hours of attorney time appropriately spent on winning aspects of the case times a reasonable hourly rate -- the job of fee measurement constitutes an undue burden on judges.<sup>130</sup> In addition, the hourly element may encourage lawyers to run up time unnecessarily, often leading either to overcompensation or later litigation over fee padding. Unfortunately, despite dissatisfaction with the current situation, it is difficult to propose ways to simplify the fee award process and ease the burden on courts and litigants. The basic problem is that in many instances fee setting depends upon assessment of the circumstances of an individual case. Moreover, stringency in fee setting threatens to undermine Congress's goals in providing for fee shifting. In addition, this is a sensitive area in which proposals for substantial change are likely to generate significant controversy.

Nevertheless, the federal courts can profitably adopt several measures: 1) to limit disputes about rates and discrepancies among judges, adoption of reasonable rate schedules regionally, nationally, or otherwise; 2) to simplify the handling of the risk of loss, adoption of a uniform enhancement factor or a schedule of factors for different types of cases; 3) to enhance regularity and perceived neutrality in fee awards and to relieve district judges of the task of setting fees, larger districts could designate a single magistrate to become taxing master and pass on all fee applications (or assign the task in some instances to special masters); and 4) to avoid later disputes over fees and apprise counsel of the standards that will govern, adopting either in general or in individual cases guidelines about such matters as the level of attorney involvement that will be compensated. In addition, because of the problems of the lodestar method, study of alternatives seems warranted; we do not propose its replacement now, however, because in many situations it seems inevitable and the alternatives -- chiefly the possibility of basing fee awards in whole or in part on a percentage of the recovery obtained -- need further analysis and experimentation. Percentage approaches, of course, are not possible when defendants are entitled to fee awards or plaintiffs seek only injunctive relief.

**D. LEGISLATIVE CHECKLIST**

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130. See, e.g., Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237 (1985).

- ▶ The Committee recommends that a checklist be created for use by Congress during the drafting of bills to encourage statements regarding:
    - (1) the appropriate statute of limitation;
    - (2) whether a private cause of action is contemplated;
    - (3) whether pre-emption of state law is intended;
    - (4) the definition of key terms;
    - (5) the mens rea requirement in criminal statutes;
    - (6) severability; and
    - (7) whether the new bill repeals or otherwise voids previous Federal legislation.
  - ▶ The Committee recommends further that this list be supplied to the Office of the Legislative Counsel.
- E. CREATION OF A NATIONAL FEDERAL-STATE COUNCIL
- ▶ The Chief Justice of the United States and the Chair of the Conference of State Chief Justices should create a national federal-state council.

The Committee notes that the Chair of the Conference of State Chief Justices has suggested the creation of a national State-Federal Council composed of an equal number of state and federal judges. The Council would study and submit recommendations for cooperative action between the dual court systems.

This Committee supports the establishment of a national Council. Interested parties have suggested that one early task of such a Council would be the consideration of a plan or plans to shorten the time required to complete habeas corpus actions by state prisoners. At present, after denial by a state supreme court of relief in a collateral proceeding, the prisoner applies for certiorari -- which is usually denied by the United States Supreme Court. Then the prisoner files a petition in the district court from whence it ultimately goes to the United States Court of Appeals.



Under one approach, the process of securing a definitive ruling on the federal questions in habeas corpus might be expedited by providing for review by the appropriate United States Court of Appeals immediately after completion of the state appellate process, rather than requiring the petitioner to first seek certiorari in the United States Supreme Court, or to submit the legal issues to the district court.

Under another suggestion, states would be encouraged to impose a form of post-conviction review immediately following the conclusion of the trial and sentencing to create a program of unitary review in the trial court. The appropriate state court, either trial or appeal, would have the authority to hold the defendant's direct appeal in abeyance pending the trial court's disposition of the post-conviction claim. Such a state procedure could expedite the time devoted to state review of all the federal questions in the defendant's case by having them resolved in a single state court appeal.

The Committee takes no position on either of these proposals, but offers each as an illustration of a question which the Council may wish to pursue.

Complex litigation in civil cases may also be an appropriate project for the Council.

Implementation of such projects might be of interest to the State Justice Institute in keeping with the Congressional intention in establishing the Institute.



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### **ADVISORS**

Robert S. Banks, Esq.  
New York, New York

Robert N. Chatigny, Esq.  
Hartford, Connecticut

Chief Judge Charles Clark  
U.S. Circuit Judge  
Jackson, Mississippi

Professor Edward H. Cooper  
Ann Arbor, Michigan

George A. Davidson, Esq.  
New York, New York

Brett Dignam, Esq.  
New Haven, CT

William B. Eldridge  
Federal Judicial Center

Professor E. Donald Elliott  
New Haven, Connecticut

Linda J. Finkelstein, Circuit Executive  
Washington, District of Columbia

Andrew Frey, Esq.  
Washington, District of Columbia

Leonard I. Garth  
U.S. Circuit Judge  
Newark, New Jersey

Kenneth Geller, Esq.  
Washington, District of Columbia

Robert E. Ginsberg  
U.S. Bankruptcy Judge  
Chicago, Illinois

Laurence Gold  
General Counsel  
AFL-CIO

David R. Hansen  
U.S. District Judge  
Clear Rapids, Iowa

Conrad K. Harper, Esq.  
New York, New York

Professor Geoffrey C. Hazard, Jr.  
New Haven, Connecticut

Patrick E. Higginbotham  
U.S. Circuit Judge  
Dallas, Texas

Professor A. Leo Levin  
Philadelphia, Pennsylvania

Professor Jerry L. Mashaw  
New Haven, Connecticut

Professor Daniel Meador  
Charlottesville, Virginia

Professor Daniel Meltzer  
Cambridge, Massachusetts

Alan Morrison, Esq.  
Public Citizens Litigation Group

Jon O. Newman  
U.S. Circuit Judge  
Hartford, Connecticut

Chief Judge Robert Peckham  
U.S. District Judge  
San Francisco, California

Chief Justice Ellen Ash Peters  
Hartford, Connecticut

A. Raymond Randolph, Esq.  
Washington, District of Columbia

Michael J. Remington, Esq.  
U.S. House of Representatives

Professor Judith Resnik  
Los Angeles, California

Professor Maurice Rosenberg  
New York, New York

Professor Linda J. Silberman  
New York, New York

Ralph S. Tyler  
Assistant Attorney General  
Baltimore, Maryland

J. Clifford Wallace  
U.S. Circuit Judge  
San Diego, California

#### CONSULTANTS

Professor Harold Bruff  
Austin, Texas

Professor Steven Burbank  
Philadelphia, Pennsylvania

Judge Thomas Carlson  
U.S. Bankruptcy Court  
San Francisco, California

Professor Erwin Chemerinsky  
Los Angeles, California

Shari Diamond  
Chicago, Illinois

Professor John Donahue  
Chicago, Illinois

Professor Rochelle Dreyfuss  
New York, New York

Roger P. Fendrich, Esq.  
Washington, D.C.

Vincent Flanagan, Circuit Executive  
Boston, Massachusetts

Steven Flanders, Circuit Executive  
New York, New York

Professor Barry Friedman  
Nashville, Tennessee

Professor Joseph Hoffman  
Bloomington, Indiana

Robert Katzmann  
The Brookings Institute

Robert E. Keeton  
U.S. District Judge  
Boston, Massachusetts

Duane R. Lee  
Administrative Office of the U.S. Courts

Professor Richard Levy  
Lawrence, Kansas

Theodore D. Lidz  
Administrative Office of the U.S. Courts

Professor Thomas Mengler  
Champaign-Urbana, Illinois

Richard Reeve, Esq.  
Office of the Federal Public Defender  
New Haven, CT

Professor Lauren Robel  
Bloomington, Indiana

Charles Rothfeld  
Washington, D.C.

Professor Daniel Shaviro  
Chicago, Illinois

Karen Siegel  
Administrative Office of the U.S. Courts

Professor Steven Steinglass  
Cleveland, Ohio

Professor Charles Weisselberg  
Los Angeles, California

Professor Richard Wilkins  
Provo, Utah

Professor Diane Wood  
Chicago, Illinois

Professor Larry Yackle  
Boston, Massachusetts

William G. Young  
U.S. District Judge  
Boston, Massachusetts

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Katherine Adams  
Bernard V. Auchter  
Noel A. Augustyn  
Lawrence H. Averill, Jr.  
Jeffrey Barr  
Lee Beck  
David Z. Beckler  
Griffin B. Bell  
Joseph Belton  
Justice William J. Brennan, Jr.  
Judge Steven Breyer  
Professor Stephen Burbank  
William R. Burchill, Jr.  
Edward J. Burger  
Chief Justice Warren E. Burger  
Professor Paul Carrington  
Judge Frank Coffin  
Paul Collard  
David Cook  
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Patricia Dundas  
Collins Fitzpatrick  
Judge Wilfred Feinberg  
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Chief Judge John J. Gibbons  
Chief Judge John C. Godbold  
Chief Judge Ted Goodwin  
Stephen W. Grafman  
Eugene Gressman  
Samuel F. Harahan  
John P. Hehman  
Professor Arthur Hellman  
Charles A. Horsky  
William M. Janssen  
Alice Jefferson  
G. Kevin Jones  
John T. Jones  
Helene L. Kaplan  
Raymond A. Karam  
Robert Katzman  
Judge Robert Keeton



Justice Anthony M. Kennedy  
Thomas Koutsy  
Michael E. Kunz  
Kathy Lanza  
Duane R. Lee  
Theodore Lidz  
Peter McCabe  
Edward F. McConnell  
Chief Judge Howard Markey  
Charles McC. Mathias, Jr.  
L. Ralph Meham  
Mark Mendenhall  
James Mercurio  
Professor Arthur R. Miller  
Michael Mooney  
Stanley Morris  
Paul Nejelski  
Chief Judge Arthur Nims  
Chief Judge James L. Oakes  
Justice Sandra Day O'Connor  
Alice L. O'Donnell  
Al Pearson  
Judge Louis H. Pollak  
Justice Lewis F. Powell, Jr.  
John Rabiej  
Chief Justice William H. Rehnquist  
Chief Judge Aubrey Robinson  
Judge Paul Roney  
Judge Alvin Rubin  
Justice Antonin Scalia  
Richard J. Seidel  
David A. Sellers  
Karen K. Siegel  
Chief Judge Loren A. Smith  
Judge Stanley Sporkin  
James ("Chips") Stewart  
Steven Suddaby  
Richard J. Sullivan  
Fern Schair Sussman  
David I. Tevelin  
Sandra Thomas  
Judge Robert Vance  
Owen Walker  
Justice Byron R. White  
Judge William Young  
Frances Kahn Zemans  
Norman Zoller  
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#### ORGANIZATIONS

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**SPEAKERS AT PUBLIC OUTREACH MEETINGS OF THE  
FEDERAL COURTS STUDY COMMITTEE  
HELD AT PASADENA, CHICAGO, BOSTON AND ATLANTA  
FROM MARCH 23 - 31, 1989**

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Margaret Hinkle, Chair Business Litigation Section Boston Bar Association	Boston	33
Nina Hunt, Chief Deputy U.S. Attorney Civil Division (N.D. GA)	Atlanta	158
R. William Ide ABA Board of Governors	Atlanta	67
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